UNITED STATES REPORTS

VOLUME 441

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1978

APRIL 16 THROUGH MAY 21, 1979

AMENDMENTS TO RULES OF APPELLATE PROCEDURE
AMENDMENTS TO RULES OF CRIMINAL PROCEDURE
AMENDMENTS TO RULES GOVERNING 28 U. S. C. §§ 2254 AND 2255 PROCEEDINGS
AMENDMENT TO RULES OF EVIDENCE

HENRY C. LIND
REPORTER OF DECISIONS

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ERRATA

439 U. S. LXXII: Insert after line 12
"Ohralik, *In re*..... 883".
439 U. S. 883: Under the heading "*Rehearing Denied*" insert after No. 76–1650 "No. D–95. IN RE DISBARMENT OF OHRALIK, 436 U. S. 953;".

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, Chief Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM H. REHNQUIST, Associate Justice.
JOHN PAUL STEVENS, Associate Justice.

RETIRED

STANLEY REED, Associate Justice.
WILLIAM O. DOUGLAS, Associate Justice.

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GRIFFIN B. BELL, Attorney General.
WADE H. McCREE, Jr., Solicitor General.
MICHAEL RODAK, Jr., Clerk.
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SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, *viz.:*

For the District of Columbia Circuit, WARREN E. BURGER, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WARREN E. BURGER, Chief Justice.

For the Fifth Circuit, LEWIS F. POWELL, JR., Associate Justice.

For the Sixth Circuit, POTTER STEWART, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, WILLIAM H. REHNQUIST, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

December 19, 1975.

(For next previous allotment, see 404 U. S., p. v.)

TABLE OF CASES REPORTED

NOTE: All undesignated references herein to the United States Code are to the 1976 edition.

Cases reported before page 901 are those decided with opinions of the Court or decisions *per curiam*. Cases reported on page 901 *et seq.* are those in which orders were entered.

	Page
Abdullah *v.* Oklahoma	964
Abram *v.* Louisiana	934
Abrams; Johnson *v.*	956
Adams; South Dakota *v.*	961
Addington *v.* Texas	418
Administrator, Fed. Railroad Admin.; Louisville & N. R. Co. *v.*	928
Air Transport Assn.; Professional Air Traffic Controllers *v.*	944
Alabama; Thompson *v.*	906
Alexander *v.* U. S. Dept. of Housing and Urban Development	39
Alonzo *v.* United States	912
Ambach *v.* Norwick	68
American Export Lines, Inc.; Safir *v.*	943
American Maritime Assn. *v.* Blumenthal	943
American Seating Co. *v.* National Seating Co.	907
ASCAP *v.* Columbia Broadcasting System	1
A&M Records, Inc. *v.* Solinger	908
Anders *v.* Floyd	928
Anderson; Pavao *v.*	941
Andrejko; Evans *v.*	956
Andrews *v.* United States	962
Andrus; Thurston *v.*	952
A-OK Motor Lines, Inc. *v.* North Alabama Express, Inc.	906
A. O. S., *In re*	951
Aponte *v.* Secretary of Health, Education, and Welfare	934
Apple Theatre, Inc. *v.* Seattle	946
Arabian *v.* Daley	960
Arizona; California *v.*	959
Arizona; Herrera *v.*	949
Arizona Board of Pardons and Paroles; Van Orden *v.*	949
Arizona Public Service Co. *v.* Snead	141
Arkansas; Ford *v.*	947

	Page
Arkansas; Reeves *v*	964
Arkansas State Highway Employees; Smith *v*	463
Ashe; North Carolina *v*	966
Aspuru *v*. United States	947
Assistant Secretary of Commerce; Safir *v*	943
A. T. Cross Co. *v*. Quill Co	908
Atkins *v*. Louisiana	927
Attorney General *v*. Wolfish	520
Attorney General of New York; Johnson *v*	956
Attorney Registration & Disciplinary Comm'n of Ill.; Carnow *v*.	956
Attorney Registration & Disciplinary Comm'n of Ill.; Rosenthal *v*.	956
Baca *v*. United States	927
Baird *v*. Pratt	952
Baker *v*. Elcona Homes Corp	933
Baker *v*. McCollan	921
Balassy *v*. Court of Appeal of California	949
Ball *v*. Carey	924
Balson; Webb *v*	964
Banks *v*. Illinois	911
Banner Sightseeing Co. *v*. Sommers	956
Barbera; Frazier *v*	940
Barksdale *v*. Sielaff	962
Barnes *v*. Chesapeake & Ohio R. Co	945
Barron *v*. United States	951
Barry; Brown *v*	950
Bartell Media Corp.; Etkes *v*	957
Bartlett *v*. United States	965
Batchelder; United States *v*	903
Battle *v*. U. S. District Court	950
Baughard; Buian *v*	924
Baughman; Bradford Coal Co. *v*	961
Bayless *v*. Estelle	938
Beal; Randle *v*	937
Beaubouef *v*. Mitchell	966
Behnke *v*. Committee on Professional Ethics of Iowa Bar Assn.	958
Bell *v*. Wolfish	520
Bellwood; Gladstone, Realtors *v*	91
Benda; Machinists & Aerospace Workers *v*	937
Benefield *v*. Florida	958
Bennett *v*. Secretary of Defense	924
Benning *v*. Taulborg Brothers Builders	910
Benns *v*. United States	936
Bernalillo County Assessor; Sawaya *v*	911
Bernhardt; Edmond *v*	924

	Page
Berryhill *v.* Zant	967
Bicentennial Shop *v.* KIRO, Inc	945
Biles *v.* Watkins	953
Binder *v.* Official Creditors' Committee	962
Bittaker; Marquez *v.*	913
Blackburn *v.* Minor	961
Blackburn *v.* United States	948
Black Clawson Co.; Standard Alliance Industries, Inc. *v.*	923
Blackwell; Safir *v.*	943
Blanding *v.* United States	925
Blanton *v.* Engle	957
Blea *v.* New Mexico	908
Bloeth *v.* Henderson	963
Bloomer *v.* Liberty Mutual Insurance Co	942
Blumenthal; American Maritime Assn. *v.*	943
Blumenthal; Church of Scientology of California *v.*	938
Board of County Comm'rs of Lee County; Martin *v.*	918
Board of Ed. of Plainview-Old Bethpage School Dist.; Kornit *v.*	917
Board of Ed. of St. Louis; Murphy *v.*	962
Board of Regents of University of Colorado; DiLeo *v.*	927
Board of Trustees of Temple University; Isaacs *v.*	918
Bodde *v.* Texas	957
Boeing Co.; British Airways Board *v.*	968
Boeing Co. *v.* Van Gemert	942
Boggs *v.* United States	965
Bolden; Mobile *v.*	930
Bong Hyun Kim, *In re*	940
Bordenkircher; Miles *v.*	934
Boston College; Lorentzen *v.*	917
Boston Hospital for Women *v.* Schwartz	918
Boteler *v.* Mississippi	943
Botero *v.* United States	944
Bracey *v.* Heeringa	926
Braden *v.* Kentucky	927
Bradford *v.* District of Columbia Hacker's License Appeal Bd.	949
Bradford *v.* United States	931
Bradford Coal Co. *v.* Baughman	961
Brasco *v.* Joint Bar Assn. Grievance Committee	905
Braunstein; Eastern Photographic Laboratories, Inc. *v.*	944
Brengelmann; Spickler *v.*	957
Briggs; Stafford *v.*	940
Brinkman; Dayton Board of Education *v.*	903
British Airways Board *v.* Boeing Co	968
Broadcast Music, Inc. *v.* Columbia Broadcasting System, Inc	1

	Page
Brockett *v.* Spokane Arcades, Inc.	945
Brookhaven Cable TV, Inc.; Kelly *v.*	904
Brookhaven Cable TV, Inc.; National Assn. of Reg. Util. Comm'rs *v.*	904
Brotherhood. For labor union, see name of trade.	
Brown *v.* Barry	950
Brown; Chrysler Corp. *v.*	281
Brown; Davis *v.*	964
Brown *v.* Glines	903, 930
Brown; Monroe *v.*	910
Brown; Pence *v.*	919, 961
Brown *v.* United States	918
Brown; Williams *v.*	930
Bub Davis Packing Co. *v.* United States	931
Bucks County Board of Assessment Appeals; Graham *v.*	946
Buian *v.* Baughard	924
Bundy *v.* Rudd	905
Bundy *v.* Utah	926
Burch *v.* Louisiana	130
Burke; Pittway Corp. *v.*	908
Burks *v.* Lasker	471
Butler; North Carolina *v.*	369
Caban *v.* Mohammed	380
Cacy *v.* United States	912
Califano; Florida Dept. of Health and Rehabilitative Services *v.*	931
Califano; Forsham *v.*	942
Califano; McCoy *v.*	901
Califano *v.* Yamasaki	959
California *v.* Arizona	959
California; California & Hawaiian Sugar Co. *v.*	932
California; Carney *v.*	963
California; Hampel *v.*	911
California; Lyon *v.*	911
California; Martinez *v.*	960
California; Miller *v.*	925
California; Pleasant *v.*	964
California; P. P. G., Inc. *v.*	952
California; Rosas *v.*	951
California & Hawaiian Sugar Co. *v.* California	932
Callahan *v.* United States	919
Cannon *v.* United States	947
Cannon *v.* University of Chicago	677
Cardillo *v.* U. S. Parole Comm'n	958
Carey; Ball *v.*	924
Carlos *v.* United States	922

	Page
Carney *v.* California	963
Carnow *v.* Attorney Registration & Disciplinary Comm'n of Ill.	956
Carroll County Dept. of Family Services; Crane *v.*	929
Carter *v.* North Carolina	964
Carter *v.* Robertson	935
Carter *v.* United States	908
Caryl; Shaw *v.*	918
Cassasa *v.* United States	909
Celebrezze; Welch *v.*	918
Central Florida Enterprises, Inc.; Cowles Broadcasting, Inc. *v.*	957
Cerrella *v.* United States	922
Chairman, Merit Systems Protection Board; Vergara *v.*	905
Chapman *v.* Houston Welfare Rights Organization	600
Cherry *v.* Secretary of Treasury	938
Chesapeake & Ohio R. Co.; Barnes *v.*	945
Chiarella *v.* United States	942
Chicago Title Insurance Co.; Hercoform, Inc. *v.*	901
Chief Judge, U. S. District Court; Platel *v.*	925
Chief Justice, Supreme Court of Ohio; Welch *v.*	918
Chrysler Corp. *v.* Brown	281
Chubb *v.* Pennsylvania	928
Church of Scientology of California *v.* Blumenthal	938
Citizens for a Better Environment; Schaumburg *v.*	922
City. See name of city.	
City Council of Richmond; Golding *v.*	907
Clanon; Posada *v.*	934
Clark; Green *v.*	904
Clark; United States *v.*	960
Clayton *v.* United States	962
Clenny *v.* Tennessee	947
Cleveland *v.* Maryland	934
Cloudy *v.* Conn	949
Cloudy *v.* Court of Appeals of Indiana	935
Cloudy *v.* Garrettson	950
Cloudy *v.* Indiana	950
Cloudy *v.* Supreme Court of Indiana	935
Coe *v.* Kolstad	939
Coffey *v.* North Carolina	925
Cohen *v.* United States	947
Cohn *v.* Norwalk Planning and Zoning Comm'n	945
Colby *v.* Driver	940
Cole *v.* Commissioner	924
Cole; Harris *v.*	39
Cole *v.* Quick	949

	Page
Cole *v.* United States	909
Coleman; Connor *v.*	792
Colorado *v.* New Mexico	902
Columbia Broadcasting System, Inc.; ASCAP *v.*	1
Columbia Broadcasting System, Inc.; Broadcast Music, Inc. *v.*	1
Columbus Board of Education *v.* Penick	903
Commissioner; Cole *v.*	924
Commissioner; Horvat *v.*	956
Commissioner, Dept. of Public Welfare of Mass.; Baird *v.*	952
Commissioner of Correction. See also name of commissioner.	
Commissioner of Correction; Phelps *v.*	934
Commissioner of Education of New York *v.* Norwick	68
Commissioner of Finance and Control of Conn.; Kincaid *v.*	933
Commissioner of Human Res. of Tex. *v.* Houston Welfare Rts. Org.	600
Commissioner of Internal Revenue. See Commissioner.	
Commissioner of Taxes of Vermont; Mobil Oil Corp. *v.*	941
Committee on Professional Ethics of Iowa Bar Assn.; Behnke *v.*	958
Commonwealth. See name of Commonwealth.	
Community Television Services, Inc.; Dresser Industries, Inc. *v.*	932
Compagnie Nationale Air France; Giliberto *v.*	932
Conn; Cloudy *v.*	949
Conn; Young *v.*	949
Connecticut; Peary *v.*	966
Connecticut; Peay *v.*	966
Conner; Michigan *v.*	943
Connley; North Carolina *v.*	929
Connor *v.* Coleman	792
Consolidated Carriers Corp. *v.* Garment Workers	932
Consumers Union of United States; GTE Sylvania, Inc. *v.*	942
Controller of San Francisco; Powell *v.*	912
Cook *v.* Muskingum Watershed Conservancy District	924
Cooper; Paris *v.*	931
Costanzo *v.* United States	961
County. See name of county.	
Court of Appeal of California; Balassy *v.*	949
Court of Appeals of Indiana; Cloudy *v.*	935
Coven *v.* Securities and Exchange Comm'n	928
Cowles Broadcasting, Inc. *v.* Central Florida Enterprises, Inc.	957
Crane *v.* Carroll County Dept. of Family Services	929
Crane; Green *v.*	911
Crawford *v.* Jackson	934
Creque *v.* Illinois	912
Croatan Books, Inc. *v.* Virginia	966
Cross Co. *v.* Quill Co	908

Page
Cupp; Washington *v*..... 909
Cyrus *v*. Indiana..... 935
Czornonoh *v*. Stallard..... 912, 968
Czornonoh *v*. U. S. Secret Service..... 912, 968
Dahm; Sears, Roebuck & Co. *v*..... 918
Daley; Arabian *v*..... 960
Daley *v*. New Jersey..... 945
Dalia *v*. United States..... 238
Dallas Morning News; Sanchez *v*..... 911
Daniels *v*. Kieser..... 931
Davis *v*. Brown..... 964
Davis; Gibson *v*..... 905
Davis *v*. Sedgwick..... 927
Davis; Southeastern Community College *v*..... 921
Davis *v*. United States..... 912, 950, 962
Davis Packing Co. *v*. United States..... 931
Dayton Board of Education *v*. Brinkman..... 903
De La Cruz; Tormey *v*..... 965
Delespine *v*. Estelle..... 957
DeLuca; Goodwyn *v*..... 935
Department of Energy; Ginsburg, Feldman & Bress *v*..... 906
Department of Housing and Urban Development; Alexander *v*.... 39
DFC Co. *v*. Rex Chainbelt, Inc..... 908
DiLeo *v*. Board of Regents of University of Colorado..... 927
Dinsio *v*. United States..... 951
Director, Bureau of Alcohol, Tobacco and Firearms; Gibson *v*.... 905
Director, Central Intelligence Agency *v*. Driver..... 940
Director, Department of Corrections; Mundy *v*..... 910
Director, Hudson County Welfare Board; Gonzalez *v*..... 600
Director of penal or correctional institution. See name of director.
Director of Revenue Division of N. M.; Arizona Public Serv. Co. *v*. 141
Director of Workers' Compensation Programs *v*. Rasmussen..... 930
DiSilvestro *v*. Veterans' Administration..... 936
District Court. See U. S. District Court.
District Judge. See U. S. District Judge.
District of Columbia Hacker's License Appeal Bd.; Bradford *v*.... 949
Dixon *v*. United States..... 951
Dolen *v*. Television Station TV 12..... 934
Douglas Oil Co. of California *v*. Petrol Stops Northwest..... 211
Dow *v*. United States..... 926
Dresser Industries, Inc. *v*. Community Television Services, Inc.... 932
Drew; Sielaff *v*..... 943
Driver; Colby *v*..... 940
Dubey & Sons, Inc.; Macomb Concrete Corp. *v*..... 944

	Page
Dyar *v.* United States	961
Earl Dubey & Sons, Inc.; Macomb Concrete Corp. *v.*	944
Eastern Photographic Laboratories, Inc. *v.* Braunstein	944
Edmond *v.* Bernhardt	924
Edmondson; Ford Motor Credit Co. *v.*	951
Edwards *v.* Seattle	926
Elam *v.* Virginia	918
Elcona Homes Corp.; Baker *v.*	933
Engle; Blanton *v.*	957
Engle; Musto *v.*	926
Enlarged City School District of Troy; McFerran *v.*	917
Esquire, Inc. *v.* Ringer	917
Estelle; Bayless *v.*	938
Estelle; Delespine *v.*	957
Estelle; Green *v.*	949
Estelle; Lantrip *v.*	948
Estelle; Mitchell *v.*	962
Estelle; Rummel *v.*	960
Etkes *v.* Bartell Media Corp.	957
Eu; Socialist Workers Party *v.*	946
Euge; United States *v.*	942
Evans *v.* Andrejko	956
Evans; Oscar Mayer & Co. *v.*	750
Exxon Corp. *v.* Federal Trade Comm'n	943
Exxon Corp.; Leonard *v.*	923
Falk, *In re*	958
Fannon *v.* United States	948
Fant; Pennsylvania *v.*	951
Faris *v.* United States	933
Farrell *v.* Johnson	956
Farrell; Powell *v.*	912
Fayetteville State University; Jawa *v.*	957
Federal Communications Comm'n; Western Communications *v.*	931
Federal Land Bank of Spokane; Miller *v.*	962
Federal Trade Comm'n; Exxon Corp. *v.*	943
Feelings *v.* LeFevre	946
Fenton; Nicholas *v.*	960
Fidelity Philadelphia Trust Co.; Pioche Mines Consolidated, Inc. *v.*	903
Fields *v.* United States	963
Figgins *v.* Hudspeth	913
Finazzo; United States *v.*	929
Finnegan *v.* Washington	917
Finney *v.* Georgia	916
Fiore *v.* Westmoreland County	923

Page
First National City Bank; Gautam *v*. 928
564.54 Acres of Land; United States *v*. 506
Flex-a-Lite Corp. *v*. Schwitzer Division, Wallace-Murray Corp. . . . 952
Florida; Benefield *v*. 958
Florida; Goode *v*. 967
Florida; Harvard *v*. 956
Florida; Hendricks *v*. 964
Florida; Lebowitz *v*. 932
Florida; Pendleton *v*. 928
Florida; Songer *v*. 956
Florida; Washington *v*. 937
Florida Dept. of Health and Rehabilitative Services *v*. Califano. . . . 931
Flowers *v*. United States. 923
Floyd; Anders *v*. 928
Flynt; Leis *v*. 956
Fodiman, *In re*. 940
Ford *v*. Arkansas. 947
Ford; P. C. Pfeiffer Co. *v*. 930
Ford Motor Co. *v*. Labor Board. 488
Ford Motor Credit Co. *v*. Edmondson. 951
Forsham *v*. Califano. 942
Fort Worth Independent School District; Henderson *v*. 906
Franklin *v*. United States. 950
Frazier *v*. Barbera. 940
Frazier *v*. Kaplan. 932
Frick *v*. United States. 913
Friedman *v*. Rogers. 917
Frommhagen *v*. United States. 917
Fullilove *v*. Kreps. 960
Gallagher *v*. United States. 933
Gambino *v*. Louisiana. 927
Gamwell; Stuart *v*. 911
Gandolfo *v*. United States. 933
Garment Workers; Consolidated Carriers Corp. *v*. 932
Garrettson; Cloudy *v*. 950
Garrettson; Young *v*. 950
Gateway Books, Inc. *v*. Jackson. 952
Gautam *v*. First National City Bank. 928
Geders *v*. United States. 922
General Dynamics Corp. *v*. Marshall. 919
General Motors Corp.; Gottesman *v*. 932
Geo Control, Inc. *v*. Rasmussen. 930
Georgia; Finney *v*. 916
Georgia; Morgan *v*. 967

	Page
Georgia; Natson *v.*	925
Georgia; Weddington *v.*	911
Giacalone *v.* United States	944
Gibson *v.* Davis	905
Gibson *v.* Louisiana	926
Gilbert, *In re*	958
Giliberto *v.* Compagnie Nationale Air France	932
Gillespie *v.* Schwartz	918
Gillock; United States *v.*	942
Gingras *v.* Mason	935
Ginsburg, Feldman & Bress *v.* Department of Energy	906
Gladstone, Realtors *v.* Bellwood	91
Glasscock *v.* Tennessee	943
Glines; Brown *v.*	903, 930
Godwin *v.* Maryland	907
Goff *v.* Hilton	950
Golding *v.* City Council of Richmond	907
Goldstein *v.* Norfolk	913
Gomes *v.* Rhode Island Interscholastic League	958
Gomez *v.* United States	948
Gonzalez *v.* United States	951
Gonzalez *v.* Young	600
Goode *v.* Florida	967
Good Government Group of Seal Beach, Inc. *v.* Hogard	961
Goodloe *v.* United States	912
Goodwyn *v.* DeLuca	935
Gordon *v.* United States	912, 936, 957
Gore *v.* United States	951
Gottesman *v.* General Motors Corp	932
Government of Canal Zone; Hodges *v.*	948
Government of Virgin Islands; John *v.*	931
Governor of Massachusetts; Preterm, Inc. *v.*	952
Governor of New York; Ball *v.*	924
Governor of South Dakota; Morrill *v.*	938
Graham *v.* Bucks County Board of Assessment Appeals	946
Grant *v.* United States	931
Green *v.* Clark	904
Green *v.* Crane	911
Green *v.* Estelle	949
Green *v.* Missouri	926
Green *v.* Missouri Board of Probation and Parole	935
Green *v.* Ralston	930
Green *v.* White	925
Green *v.* Wyrick	912

	Page
Greenblatt *v.* United States	917
Greene *v.* United States	913
Group Life & Health Insurance Co. *v.* Royal Drug Co	917
GTE Sylvania, Inc. *v.* Consumers Union of United States	942
Gunduy *v.* United States	944
Hall; Nevada *v.*	917
Hall *v.* United States	961, 962
Hampel *v.* California	911
Hampton *v.* United States	928
Hanley *v.* U. S. District Court	924
Hansen *v.* Minnesota State Board of Bar Examiners	938
Harco Products, Inc. *v.* Rex Chainbelt, Inc	908
Harries *v.* Mississippi	948
Harrington *v.* Vandalia-Butler Board of Education	932
Harris *v.* Cole	39
Harrison *v.* Illinois	949
Harrison *v.* Indiana	912
Harvard *v.* Florida	956
Harvey *v.* United States	936
Hathorn *v.* Lovorn	946
Hatzlachh Supply Co. *v.* United States	942
Hauck *v.* United States	947
Haughey *v.* New York State Board of Law Examiners	964
Hawaii; McNulty *v.*	961
Hawkins *v.* United States	910
Haynie *v.* United States	958
Heavrin *v.* Kentucky Bar Assn	946
Heeringa; Bracey *v.*	926
Heldon *v.* Pennsylvania	945
Helton *v.* United States	966
Henderson; Bloeth *v.*	963
Henderson *v.* Fort Worth Independent School District	906
Henderson; Solberg *v.*	911
Henderson *v.* United States	947
Hendricks *v.* Florida	964
Hennessy *v.* Hennessy	901
Herbert *v.* Lando	153
Hercoform, Inc. *v.* Chicago Title Insurance Co	901
Heredia-Naranjo *v.* United States	936
Herman *v.* United States	913
Hernandez *v.* U. S. District Court	937
Herrera *v.* Arizona	949
Herrera *v.* New Mexico	909
Herring *v.* United States	947

	Page
Hickel *v.* Thomas	907
Hicks *v.* United States	923
Higgins *v.* Marshall	931
Hightower *v.* Jago	935
Hilton; Goff *v.*	950
Hodges *v.* Government of Canal Zone	948
Hogard; Good Government Group of Seal Beach, Inc. *v.*	961
Hohensee *v.* Spadine	957
Holland *v.* Seaboard Coast Line R. Co.	905
Holsey *v.* Mandel	925
Honicker *v.* Nuclear Regulatory Comm'n	906
Horvat *v.* Commissioner	956
Hough *v.* United States	961
Houston Welfare Rights Organization; Chapman *v.*	600
Howe *v.* United States	963
Howell *v.* United States	966
Hudson *v.* United States	927
Hudspeth; Figgins *v.*	913
Hufault *v.* United States	965
Huff; Secretary of Navy *v.*	903
Hughes *v.* Hughes	901
Hughes *v.* Oklahoma	322
Hughes; Parham *v.*	347
Huling *v.* Ohio	925
Hunt; Miller *v.*	918
Hunt *v.* Missouri	901
Illinois; Banks *v.*	911
Illinois; Creque *v.*	912
Illinois; Harrison *v.*	949
Illinois; Knights *v.*	908
Illinois; Michigan *v.*	921
Illinois; New York *v.*	921
Illinois; Raicevich *v.*	963
Illinois; Stewart *v.*	907
Illinois; Veal *v.*	908, 957
Illinois; Weinger *v.*	923
Illinois; Williams *v.*	911
Illinois; Wisconsin *v.*	921
Illinois Office of Education *v.* Jennings	967
Immigration and Naturalization Service; Vaicekauskas *v.*	908
Immigration and Naturalization Service; Villanueva *v.*	943
Imperial Distributors, Inc. *v.* Petrine	927
Indiana; Cloudy *v.*	950
Indiana; Cyrus *v.*	935

Page
Indiana; Harrison *v*..... 912
Indiana; Kentucky *v*..... 941
Indiana; Wine *v*..... 907
Indiana; Young *v*..... 950
Indiana State University Board of Trustees; Lynch *v*..... 946
In re. See name of party.
International. For labor union, see name of trade.
Iowa Beef Processors, Inc. *v*. Smith..... 907
Irving *v*. Mississippi..... 913
Isaacs *v*. Board of Trustees of Temple University..... 918
Jackson; Crawford *v*..... 934
Jackson; Gateway Books, Inc. *v*..... 952
Jackson *v*. United States..... 912, 944
Jacobs *v*. Oregon..... 926
Jaffee *v*. United States..... 961
Jago; Hightower *v*..... 935
Jago; Morris *v*..... 926
Jago; Roberts *v*..... 949
Janklow; Morrill *v*..... 938
Japan Line, Ltd. *v*. Los Angeles County..... 434
Jawa *v*. Fayetteville State University..... 957
Jeffes; Wood *v*..... 957
Jennings; Illinois Office of Education *v*..... 967
Jennings *v*. Oklahoma..... 964
John *v*. Government of Virgin Islands..... 931
John *v*. United States..... 925
John M. Lee, Inc.; Ply*Gem Industries, Inc. *v*..... 967
Johnson *v*. Abrams..... 956
Johnson; Farrell *v*..... 956
Johnson *v*. United States..... 906, 948
Johnson *v*. U. S. District Court..... 903
Johnson Oil Co. *v*. Mountain Fuel Supply Co..... 952
Joint Bar Assn. Grievance Committee; Brasco *v*..... 905
Joint Bar Assn. Grievance Committee; Podell *v*..... 905
Joint Bar Assn. Grievance Committee; Thies *v*..... 939
Jones *v*. Missouri..... 902
Jones; Turner *v*..... 917
Jones *v*. United States..... 947, 951, 963
Jones; Vitek *v*..... 922, 960
Judge, U. S. Court of Appeals; Connor *v*..... 792
Juvenile Dept. of Multnomah County; Vaughn *v*..... 934
Kansas; Smith *v*..... 964
Kansas; Warden *v*..... 948
Kansas City Terminal R. Co.; Railway Clerks *v*..... 907

	Page
Kaplan; Frazier *v.*	932
Kapp *v.* National Football League	907
Karabatsos *v.* Vander Zee	962
Kaufman, *In re*	920
Kaufman *v.* North Alabama Express, Inc.	906
Kelley; Reeves, Inc. *v.*	939
Kelly *v.* Brookhaven Cable TV, Inc.	904
Kentucky; Braden *v.*	927
Kentucky *v.* Indiana	941
Kentucky *v.* Whorton	786
Kentucky Bar Assn.; Heavrin *v.*	946
Kerner *v.* State Employees' Retirement System of Illinois	923
Kessler *v.* New York	910
Kieser; Daniels *v.*	931
Kim, *In re*	940
Kincaid *v.* Commissioner of Finance and Control of Conn.	933
King; Preterm, Inc. *v.*	952
Kingsbury *v.* United States	950
KIRO, Inc.; Bicentennial Shop *v.*	945
KIRO, Inc.; Sims *v.*	945
Kissinger *v.* Reporters Committee for Freedom of Press	904
Kissinger; Reporters Committee for Freedom of Press *v.*	904
Kleinman; Prenzler *v.*	933
Klingaman *v.* Sommers	956
Kluge *v.* Superior Court of California	923
Knights *v.* Illinois	908
Kolstad; Coe *v.*	939
Kolstad; Robinson *v.*	939
Kornit *v.* Board of Ed. of Plainview-Old Bethpage School Dist.	917
Kraemer *v.* Mental Health Board of Nebraska	960
Kreps; Fullilove *v.*	960
Kumar *v.* Ohio	910
Labor Board; Ford Motor Co. *v.*	488
Labor Union. See name of trade.	
Ladany *v.* Overberg	925
Ladd *v.* Ohio	926
Lando; Herbert *v.*	153
Landrum *v.* United States	909
Lantrip *v.* Estelle	948
Lasker; Burks *v.*	471
Latshaw *v.* Pennsylvania	931
Lebowitz *v.* Florida	932
Lee-Hy Paving Corp. *v.* O'Connor	918
Lee, Inc.; Ply*Gem Industries, Inc. *v.*	967

Page
Leeke; Queen *v*. . . . 925
LeFevre; Feelings *v*. . . . 946
Lefton *v*. United States. . . . 913
Leis *v*. Flynt. . . . 956
Leonard *v*. Exxon Corp. . . . 923
Leslie *v*. Massachusetts. . . . 910
Levy *v*. United States. . . . 917
Lewis; Transamerica Mortgage Advisors, Inc. *v*. . . . 930
Liberty Mutual Insurance Co.; Bloomer *v*. . . . 942
Liepelt; Norfolk & Western R. Co. *v*. . . . 904
Lieutenant Governor of Alaska; Hickel *v*. . . . 907
Lightner *v*. Ohio. . . . 926
Linares *v*. United States. . . . 947
Lincoln Intermediate Unit No. 12; McCoy *v*. . . . 923
Linebarger *v*. Oklahoma. . . . 964
Little *v*. United States. . . . 946
Lizarraga *v*. United States. . . . 965
Local. For labor union, see name of trade.
Lodge. For labor union, see name of trade.
Lorentzen *v*. Boston College. . . . 917
Los Angeles County; Japan Line, Ltd. *v*. . . . 434
Louisiana; Abram *v*. . . . 934
Louisiana; Atkins *v*. . . . 927
Louisiana; Burch *v*. . . . 130
Louisiana; Gambino *v*. . . . 927
Louisiana; Gibson *v*. . . . 926
Louisiana; Muse *v*. . . . 929
Louisiana; Procell *v*. . . . 944
Louisville & Nashville R. Co. *v*. Sullivan. . . . 928
Lovallo *v*. Veterans' Administration. . . . 937
Loveless *v*. Maryland. . . . 905
Lovorn; Hathorn *v*. . . . 946
Luddington *v*. United States. . . . 936
Lynch *v*. Indiana State University Board of Trustees. . . . 946
Lyon *v*. California. . . . 911
Lyon *v*. United States. . . . 910
Lyons *v*. United States. . . . 925
Machinists & Aerospace Workers *v*. Benda. . . . 937
Macomb Concrete Corp. *v*. Earl Dubey & Sons, Inc. . . . 944
Macurdy, *In re*. . . . 920
Mandel; Holsey *v*. . . . 925
Marcantoni *v*. United States. . . . 937
Marquez *v*. Bittaker. . . . 913
Marshall; General Dynamics Corp. *v*. . . . 919

Page
Marshall; Higgins *v*. 931
Martin *v*. Board of County Comm'rs of Lee County 918
Martin *v*. United States 912, 962
Martinez *v*. California 960
Martino *v*. United States 927
Maryland; Cleveland *v*. 934
Maryland; Godwin *v*. 907
Maryland; Loveless *v*. 905
Maryland; Mathias *v*. 906
Maryland; Phelps *v*. 934
Mason; Gingras *v*. 935
Mason *v*. United States 909, 933
Massachusetts; Leslie *v*. 910
Mathias *v*. Maryland 906
May *v*. Ohio 949
Mayer & Co. *v*. Evans 750
Mayor of Atlanta; Gateway Books, Inc. *v*. 952
Mayor of Louisville *v*. Lovorn 946
Mayor of Washington; Brown *v*. 950
McCall *v*. United States 936
McCarter; Murrell *v*. 950
McCarthy *v*. United States 961
McCollan; Baker *v*. 921
McConkey; Miles *v*. 949
McCoy *v*. Califano 901
McCoy *v*. Lincoln Intermediate Unit No. 12 923
McDaniel *v*. United States 952
McFerran *v*. Enlarged City School District of Troy 917
McGowan *v*. United States 933
McLain *v*. Morris 909
McLain *v*. Real Estate Board of New Orleans 942
McMillian *v*. Texas 935
McNulty *v*. Hawaii 961
Mental Health Board of Nebraska; Kraemer *v*. 960
Mercuri *v*. United States 946
Miami *v*. St. Joe Paper Co 939
Miami Copper Co. Div., Tennessee Corp. *v*. Tax Comm'n of Ariz. . 932
Michigan *v*. Conner 943
Michigan *v*. Illinois 921
Mid-Continent Spring Co. of Kentucky *v*. Mitchell 922
Mid-Continent Spring Co. of Kentucky; Mitchell *v*. 922
Miles *v*. Bordenkircher 934
Miles *v*. McConkey 949
Miller *v*. California 925

Page
Miller *v.* Federal Land Bank of Spokane 962
Miller *v.* Hunt 918
Milligan *v.* Pennsylvania 911
Minnesota State Board of Bar Examiners; Hansen *v.* 938
Minor; Blackburn *v.* 961
Mississippi; Boteler *v.* 943
Mississippi; Harries *v.* 948
Mississippi; Irving *v.* 913
Mississippi; Voyles *v.* 956
Mississippi; Washington *v.* 916
Missouri; Green *v.* 926
Missouri; Hunt *v.* 901
Missouri; Jones *v.* 902
Missouri Board of Probation and Parole; Green *v.* 935
Mitchell; Beaubouef *v.* 966
Mitchell *v.* Estelle 962
Mitchell *v.* Mid-Continent Spring Co. of Kentucky 922
Mitchell; Mid-Continent Spring Co. of Kentucky *v.* 922
Mitchell; Poe *v.* 917
Mobile *v.* Bolden 930
Mobil Oil Corp. *v.* Commissioner of Taxes of Vermont 941
Modern American Mortgage Corp.; Rickman *v.* 962
Moenckmeier *v.* United States 906
Mohammed; Caban *v.* 380
Monroe *v.* Brown 910
Montez *v.* United States 965
Moore *v.* Virginia 909
Morelock *v.* NCR Corp 906
Moreno; Toll *v.* 458
Moreno *v.* United States 917, 936
Morgan *v.* Georgia 967
Morrill *v.* Janklow 938
Morris *v.* Jago 926
Morris; McLain *v.* 909
Morrison *v.* United States 936
Morton *v.* United States 950
Motown Record Corp. *v.* Solinger 908
Mountain Fuel Supply Co.; Johnson Oil Co. *v.* 952
Mundy *v.* Director, Department of Corrections 910
Murphy *v.* Board of Education of St. Louis 962
Murrell *v.* McCarter 950
Muse *v.* Louisiana 929
Muskingum Watershed Conservancy District; Cook *v.* 924
Musto *v.* Engle 926

	Page
Naftalin; United States *v.*	768
Nashville Banner Publishing Co.; Taylor *v.*	923
National Assn. of Reg. Utility Comm'rs *v.* Brookhaven Cable TV.	904
National Football League; Kapp *v.*	907
National Labor Relations Board. See Labor Board.	
National Seating Co.; American Seating Co. *v.*	907
Natson *v.* Georgia	925
Navajo Tribe; United States *v.*	944
NCR Corp.; Morelock *v.*	906
Neiswender *v.* United States	963
Nevada *v.* Hall	917
Newgent; Walker *v.*	906
New Jersey; Daley *v.*	945
New Jersey; Zarinsky *v.*	924
New Mexico; Blea *v.*	908
New Mexico; Colorado *v.*	902
New Mexico; Herrera *v.*	909
New York *v.* Illinois	921
New York; Kessler *v.*	910
New York; Payton *v.*	930
New York; Riddick *v.*	930
New York; Robertson *v.*	910
New York; Travison *v.*	949
New York City; Patrolmen's Benevolent Assn. *v.*	945
New York State Board of Law Examiners; Haughey *v.*	964
Nicholas *v.* Fenton	960
91.90 Acres of Land *v.* United States	944
Noall *v.* United States	923
Norfolk; Goldstein *v.*	913
Norfolk & Western R. Co. *v.* Liepelt	904
North Alabama Express, Inc.; A–OK Motor Lines, Inc. *v.*	906
North Alabama Express, Inc.; Kaufman *v.*	906
North Carolina *v.* Ashe	966
North Carolina *v.* Butler	369
North Carolina; Carter *v.*	964
North Carolina; Coffey *v.*	925
North Carolina *v.* Connley	929
North Carolina; Sallie *v.*	911
North Carolina; Vaughn *v.*	935
Norwalk Planning and Zoning Comm'n; Cohn *v.*	945
Norwick; Ambach *v.*	68
Nowlin *v.* Pearl	946
Nuclear Regulatory Comm'n; Honicker *v.*	906
O'Bannon *v.* Town Court Nursing Center	904

Page
O'Connor; Lee-Hy Paving Corp. *v.* 918
Office of Personnel Management; White *v.* 919
Official Creditors' Committee; Binder *v.* 962
Ohio; Huling *v.* 925
Ohio; Kumar *v.* 910
Ohio; Ladd *v.* 926
Ohio; Lightner *v.* 926
Ohio; May *v.* 949
Ohio *v.* Roberts 904
Ohio; Sarnescky *v.* 926
Ohio; Shepard *v.* 934
Ohio; Walker *v.* 924
Ohio; Wilson *v.* 945
Oklahoma; Abdullah *v.* 964
Oklahoma; Hughes *v.* 322
Oklahoma; Jennings *v.* 964
Oklahoma; Linebarger *v.* 964
Oliphant *v.* United States 962
Olson *v.* United States 940
Ordonez *v.* United States 963
Oregon; Jacobs *v.* 926
Oregon *ex rel.* Juvenile Dept. of Multnomah County; Vaughn *v.* .. 934
Oregon State Board of Dental Examiners; Van Gordon *v.* 907
Oronoz *v.* U. S. District Court 918
Oscar Mayer & Co. *v.* Evans 750
Otterbein *v.* United States 943
Overberg; Ladany *v.* 925
Pacelli *v.* United States 908
Packard *v.* Vallejo 933
Parham *v.* Hughes 347
Paris *v.* Cooper 931
Parker *v.* United States 962
Parsells *v.* United States 948
Parson; Steelworkers *v.* 968
Patman *v.* United States 933
Patrolmen's Benevolent Assn. *v.* New York City 945
Paul *v.* United States 909
Pavao *v.* Anderson 941
Payton *v.* New York 930
P. C. Pfeiffer Co. *v.* Ford 930
Pearl; Nowlin *v.* 946
Peary *v.* Connecticut 966
Peay *v.* Connecticut 966
Pence *v.* Brown 919, 961

Page

Pendleton *v.* Florida 928
Penick; Columbus Board of Education *v.* 903
Pennsylvania; Chubb *v.* 928
Pennsylvania *v.* Fant 951
Pennsylvania; Heldon *v.* 945
Pennsylvania; Latshaw *v.* 931
Pennsylvania; Milligan *v.* 911
Pennsylvania *v.* Ritter 913
Pennsylvania; Van Cliff *v.* 964
Perez-Lopez *v.* United States 950
Perkins *v.* United States 965
Peters *v.* United States 948
Petrine; Imperial Distributors, Inc. *v.* 927
Petrol Stops Northwest; Douglas Oil Co. of California *v.* 211
Pfeiffer Co. *v.* Ford 930
Phelps *v.* Commissioner of Correction 934
Phelps *v.* Maryland 934
Pioche Mines Consolidated, Inc. *v.* Fidelity Philadelphia Trust Co. . 903
Pitts *v.* United States 948
Pittway Corp. *v.* Burke 908
Platel *v.* Young 925
Pleasant *v.* California 964
Pleasant *v.* Washington 935
Ply*Gem Industries, Inc. *v.* John M. Lee, Inc 967
Podell *v.* Joint Bar Assn. Grievance Committee 905
Poe *v.* Mitchell 917
Port Authority of New York and New Jersey; Williams *v.* 945
Posada *v.* Clanon 934
Potestio *v.* United States 963
Powell, *In re* 920, 940
Powell *v.* Farrell 912
P. P. G., Inc. *v.* California 952
Pratt; Baird *v.* 952
Prenzler *v.* Kleinman 933
Prenzler *v.* U. S. District Court 933
President, University of Maryland *v.* Moreno 458
Preterm, Inc. *v.* King 952
Pristo; Rodes *v.* 951
Procell *v.* Louisiana 944
Proesel *v.* United States 961
Professional Air Traffic Controllers *v.* Air Transport Assn. 944
Prosecuting Attorney of Spokane County *v.* Spokane Arcades, Inc. . 945
Pynes *v.* United States 904
Queen *v.* Leeke 925

Page

Quick; Cole *v*. . . . 949
Quill Co.; A. T. Cross Co. *v*. . . . 908
Raicevich *v*. Illinois. . . . 963
Railway Clerks *v*. Kansas City Terminal R. Co. . . . 907
Raleigh Industries of America; Wheeler Dealers, Inc. *v*. . . . 924
Ralston; Green *v*. . . . 930
Randle *v*. Beal. . . . 937
Rasmussen; Director of Workers' Compensation Programs *v*. . . . 930
Rasmussen; Geo Control, Inc. *v*. . . . 930
Ratcliff, *In re*. . . . 919
Real Estate Board of New Orleans; McLain *v*. . . . 942
Rector *v*. United States. . . . 963
Reedy, *In re*. . . . 919, 959
Reeves *v*. Arkansas. . . . 964
Reeves, Inc. *v*. Kelley. . . . 939
Regelin *v*. United States. . . . 927
Regional Director, NLRB; Steelworkers *v*. . . . 902
Reiser, *In re*. . . . 920
Reporters Committee for Freedom of Press *v*. Kissinger. . . . 904
Reporters Committee for Freedom of Press; Kissinger *v*. . . . 904
Rex Chainbelt, Inc.; DFC Co. *v*. . . . 908
Rex Chainbelt, Inc.; Harco Products, Inc. *v*. . . . 908
Reynolds *v*. United States. . . . 910
Rhode Island Interscholastic League; Gomes *v*. . . . 958
Richardson *v*. United States. . . . 937
Rickman *v*. Modern American Mortgage Corp. . . . 962
Riddick *v*. New York. . . . 930
Riggsbee *v*. Romero. . . . 909
Ringer; Esquire, Inc. *v*. . . . 917
Rinn *v*. United States. . . . 931
Ritter; Pennsylvania *v*. . . . 913
Roberts *v*. Jago. . . . 949
Roberts; Ohio *v*. . . . 904
Roberts *v*. United States. . . . 909
Robertson; Carter *v*. . . . 935
Robertson *v*. New York. . . . 910
Robertson *v*. United States. . . . 946
Robinson *v*. Kolstad. . . . 939
Robinson *v*. United States. . . . 936, 947, 950
Rodes *v*. Pristo. . . . 951
Rogers; Friedman *v*. . . . 917
Rogers; Texas Optometric Assn. *v*. . . . 917
Rogers *v*. United States. . . . 947
Romero; Riggsbee *v*. . . . 909

	Page
Rosas *v.* California	951
Rosenthal *v.* Attorney Registration & Disciplinary Comm'n of Ill.	956
Ross *v.* Swartzberg	932
Rothbart, *In re*	920
Rowan *v.* United States	957
Rowlett *v.* United States	917
Royal Drug Co.; Group Life & Health Insurance Co. *v.*	917
Rudd; Bundy *v.*	905
Rudder *v.* Wise County Housing and Redevelopment Authority	939
Rudolph *v.* Wagner Electric Corp	924
Rummell *v.* Estelle	960
Rutherford; United States *v.*	903, 920
Ryan *v.* United States	944
S., *In re*	951
Safir *v.* American Export Lines, Inc	943
Safir *v.* Blackwell	943
St. Joe Paper Co.; Miami *v.*	939
Sallie *v.* North Carolina	911
Sanchez *v.* Dallas Morning News	911
Santora; United States *v.*	939
Santos *v.* United States	906
Sarnescky *v.* Ohio	926
Satterfield *v.* Sunny Day Resources, Inc	938
Sawaya *v.* Bernalillo County Assessor	911
Scales *v.* United States	946
Schaumburg *v.* Citizens for a Better Environment	922
Schlanger *v.* United States	943
Schwartz; Boston Hospital for Women *v.*	918
Schwartz; Gillespie *v.*	918
Schwitzer Division, Wallace-Murray Corp.; Flex-a-Lite Corp. *v.*	952
Seaboard Coast Line R. Co.; Holland *v.*	905
Sears, Roebuck & Co. *v.* Dahm	918
Seattle; Apple Theatre, Inc. *v.*	946
Seattle; Edwards *v.*	926
Secretary, Dept. of Public Welfare of Pa.; Randle *v.*	937
Secretary of Commerce; Fullilove *v.*	960
Secretary of Defense; Bennett *v.*	924
Secretary of Defense; Chrysler Corp. *v.*	281
Secretary of Defense *v.* Glines	903, 930
Secretary of Defense; Pence *v.*	919, 961
Secretary of HEW; Aponte *v.*	934
Secretary of HEW; Florida Dept. of Health *v.*	931
Secretary of HEW; Forsham *v.*	942
Secretary of HEW; McCoy *v.*	901

Page

Secretary of HEW; Velez *v.* 963
Secretary of HEW *v.* Yamasaki 959
Secretary of Housing and Urban Development *v.* Cole 39
Secretary of Interior; Thurston *v.* 952
Secretary of Labor; General Dynamics Corp. *v.* 919
Secretary of Labor; Higgins *v.* 931
Secretary of Navy *v.* Huff 903
Secretary of Public Welfare of Pa. *v.* Town Court Nursing Center 904
Secretary of State of California; Socialist Workers Party *v.* 946
Secretary of Transportation; South Dakota *v.* 961
Secretary of Treasury; American Maritime Assn. *v.* 943
Secretary of Treasury; Cherry *v.* 938
Secretary of Treasury; Church of Scientology of California *v.* 938
Securities and Exchange Comm'n; Coven *v.* 928
Sedgwick; Davis *v.* 927
Seidlitz *v.* United States 922
Semaan *v.* United States 965
Shannon *v.* Waterhouse 917
Shaw *v.* Caryl 918
Sheffield *v.* United States 965
Shepard *v.* Ohio 934
Shreeves *v.* United States 943
Sielaff; Barksdale *v.* 962
Sielaff *v.* Drew 943
Simms *v.* United States 948
Sims *v.* KIRO, Inc. 945
Small Business Administration; Walton *v.* 917
Smith *v.* Arkansas State Highway Employees 463
Smith; Iowa Beef Processors, Inc. *v.* 907
Smith *v.* Kansas 964
Smith *v.* Smith 910
Smith *v.* Superintendent, Powhatan Correctional Center 949
Smith *v.* United States 912, 922
Smith *v.* Virginia 967
Smith *v.* York 908
Snead; Arizona Public Service Co. *v.* 141
Snead *v.* United States 909
Soblotney *v.* United States 933
Socialist Workers Party *v.* Eu 946
Solberg *v.* Henderson 911
Solicitor of Richland County *v.* Floyd 928
Solien; Steelworkers *v.* 902
Solinger; A&M Records, Inc. *v.* 908
Solinger; Motown Record Corp. *v.* 908

	Page
Sommers; Banner Sightseeing Co. *v.*	956
Sommers; Klingaman *v.*	956
Songer *v.* Florida	956
Soto-Camarena *v.* United States	965
South Dakota *v.* Adams	961
Southeastern Community College *v.* Davis	921
Southland Royalty Co. *v.* United States	905
Spadine; Hohensee *v.*	957
Speech *v.* United States	947
Spencer *v.* Spencer	958
Spenkelink *v.* Wainwright	937
Sperling *v.* United States	947
Spickler *v.* Brengelmann	957
Spokane Arcades, Inc.; Brockett *v.*	945
Sremaniak *v.* United States	963
Stafford *v.* Briggs	940
Stahl; Zepeda *v.*	909
Stallard; Czornonoh *v.*	912, 968
Standard Alliance Industries, Inc. *v.* Black Clawson Co.	923
Standard Brands, Inc.; Warehousemen *v.*	957
State. See name of State.	
State Employees' Retirement System of Illinois; Kerner *v.*	923
Steelworkers *v.* Parson	968
Steelworkers *v.* Solien	902
Stewart *v.* Illinois	907
Stewart *v.* United States	933
Strain *v.* Turner	945
Strouse *v.* Winter	945
Stuart *v.* Gamwell	911
Sullivan; Louisville & Nashville R. Co. *v.*	928
Sunny Day Resources, Inc.; Satterfield *v.*	938
Sun Oil Co. of Pa. *v.* Unemployment Compensation Bd. of Pa.	968
Superintendent of penal or correctional institution. See name or title of superintendent.	
Superintendent, Powhatan Correctional Center; Smith *v.*	949
Superior Court of California; Kluge *v.*	923
Supreme Court of Indiana; Cloudy *v.*	935
Swartzberg; Ross *v.*	932
Swiderski *v.* United States	933
Taulborg Brothers Builders; Benning *v.*	910
Taxation with Representation *v.* United States	905
Tax Comm'n of Ariz.; Miami Copper Co. Div., Tenn. Corp. *v.*	932
Taylor *v.* Nashville Banner Publishing Co.	923
Teitelbaum, *In re*	919

Page
Television Station TV 12; Dolen *v*.... 934
Tempesta *v*. United States.... 910
Tennessee; Clenny *v*.... 947
Tennessee; Glasscock *v*.... 943
Texas; Addington *v*.... 418
Texas; Bodde *v*.... 957
Texas; McMillian *v*.... 935
Texas; Von Byrd *v*.... 967
Texas Optometric Assn. *v*. Rogers.... 917
Thies *v*. Joint Bar Assn. Grievance Committee.... 939
Thomas; Hickel *v*.... 907
Thompson *v*. Alabama.... 906
Thompson *v*. United States.... 908
Thornton *v*. United States.... 936
Thurston *v*. Andrus.... 952
Timmreck; United States *v*.... 780
Toll *v*. Moreno.... 458
Tormey *v*. De La Cruz.... 965
Town Court Nursing Center; O'Bannon *v*.... 904
Transamerica Mortgage Advisors, Inc. *v*. Lewis.... 930
Travison *v*. New York.... 949
Tubbs; Walls *v*.... 960
Tucker *v*. United States.... 922
Turner, *In re*.... 919
Turner *v*. Jones.... 917
Turner; Strain *v*.... 945
Unemployment Compensation Bd. of Pa.; Sun Oil Co. of Pa. *v*.... 968
Union. For labor union, see name of trade.
United. For labor union, see name of trade.
United States; Alonzo *v*.... 912
United States; Andrews *v*.... 962
United States; Aspuru *v*.... 947
United States; Baca *v*.... 927
United States; Barron *v*.... 951
United States; Bartlett *v*.... 965
United States *v*. Batchelder.... 903
United States; Benns *v*.... 936
United States; Blackburn *v*.... 948
United States; Blanding *v*.... 925
United States; Boggs *v*.... 965
United States; Botero *v*.... 944
United States; Bradford *v*.... 931
United States; Brown *v*.... 918
United States; Bub Davis Packing Co. *v*.... 931

Page
United States; Cacy *v*. 912
United States; Callahan *v*. 919
United States; Cannon *v*. 947
United States; Carlos *v*. 922
United States; Carter *v*. 908
United States; Cassasa *v*. 909
United States; Cerrella *v*. 922
United States; Chiarella *v*. 942
United States *v*. Clark. 960
United States; Clayton *v*. 962
United States; Cohen *v*. 947
United States; Cole *v*. 909
United States; Costanzo *v*. 961
United States; Dalia *v*. 238
United States; Davis *v*. 912, 950, 962
United States; Dinsio *v*. 951
United States; Dixon *v*. 951
United States; Dow *v*. 926
United States; Dyar *v*. 961
United States *v*. Euge. 942
United States; Fannon *v*. 948
United States; Faris *v*. 933
United States; Fields *v*. 963
United States *v*. Finazzo. 929
United States *v*. 564.54 Acres of Land. 506
United States; Flowers *v*. 923
United States; Franklin *v*. 950
United States; Frick *v*. 913
United States; Frommhagen *v*. 917
United States; Gallagher *v*. 933
United States; Gandolfo *v*. 933
United States; Geders *v*. 922
United States; Giacalone *v*. 944
United States *v*. Gillock. 942
United States; Gomez *v*. 948
United States; Gonzalez *v*. 951
United States; Goodloe *v*. 912
United States; Gordon *v*. 912, 936, 957
United States; Gore *v*. 951
United States; Grant *v*. 931
United States; Greenblatt *v*. 917
United States; Greene *v*. 913
United States; Gunduy *v*. 944
United States; Hall *v*. 961, 962

Page
United States; Hampton *v*..... 928
United States; Harvey *v*..... 936
United States; Hatzlachh Supply Co. *v*..... 942
United States; Hauck *v*..... 947
United States; Hawkins *v*..... 910
United States; Haynie *v*..... 958
United States; Helton *v*..... 966
United States; Henderson *v*..... 947
United States; Heredia-Naranjo *v*..... 936
United States; Herman *v*..... 913
United States; Herring *v*..... 947
United States; Hicks *v*..... 923
United States; Hough *v*..... 961
United States; Howe *v*..... 963
United States; Howell *v*..... 966
United States; Hudson *v*..... 927
United States; Hufault *v*..... 965
United States; Jackson *v*..... 912, 944
United States; Jaffee *v*..... 961
United States; John *v*..... 925
United States; Johnson *v*..... 906, 948
United States; Jones *v*..... 947, 951, 963
United States; Kingsbury *v*..... 950
United States; Landrum *v*..... 909
United States; Lefton *v*..... 913
United States; Levy *v*..... 917
United States; Linares *v*..... 947
United States; Little *v*..... 946
United States; Lizarraga *v*..... 965
United States; Luddington *v*..... 936
United States; Lyon *v*..... 910
United States; Lyons *v*..... 925
United States; Marcantoni *v*..... 937
United States; Martin *v*..... 912, 962
United States; Martino *v*..... 927
United States; Mason *v*..... 909, 933
United States; McCall *v*..... 936
United States; McCarthy *v*..... 961
United States; McDaniel *v*..... 952
United States; McGowan *v*..... 933
United States; Mercuri *v*..... 946
United States; Moenckmeier *v*..... 906
United States; Montez *v*..... 965
United States; Moreno *v*..... 917, 936

Page

United States; Morrison *v*..... 936
United States; Morton *v*..... 950
United States *v.* Naftalin..... 768
United States *v.* Navajo Tribe..... 944
United States; Neiswender *v*..... 963
United States; 91.90 Acres of Land *v*..... 944
United States; Noall *v*..... 923
United States; Oliphant *v*..... 962
United States; Olson *v*..... 940
United States; Ordonez *v*..... 963
United States; Otterbein *v*..... 943
United States; Pacelli *v*..... 908
United States; Parker *v*..... 962
United States; Parsells *v*..... 948
United States; Patman *v*..... 933
United States; Paul *v*..... 909
United States; Perez-Lopez *v*..... 950
United States; Perkins *v*..... 965
United States; Peters *v*..... 948
United States; Pitts *v*..... 948
United States; Potestio *v*..... 963
United States; Proesel *v*..... 961
United States; Pynes *v*..... 904
United States; Rector *v*..... 963
United States; Regelin *v*..... 927
United States; Reynolds *v*..... 910
United States; Richardson *v*..... 937
United States; Rinn *v*..... 931
United States; Roberts *v*..... 909
United States; Robertson *v*..... 946
United States; Robinson *v*..... 936, 947, 950
United States; Rogers *v*..... 947
United States; Rowan *v*..... 957
United States; Rowlett *v*..... 917
United States *v.* Rutherford..... 903, 920
United States; Ryan *v*..... 944
United States *v.* Santora..... 939
United States; Santos *v*..... 906
United States; Scales *v*..... 946
United States; Schlanger *v*..... 943
United States; Seidlitz *v*..... 922
United States; Semaan *v*..... 965
United States; Sheffield *v*..... 965
United States; Shreeves *v*..... 943

Page

United States; Simms *v*..... 948
United States; Smith *v*..... 912, 922
United States; Snead *v*..... 909
United States; Soblotney *v*..... 933
United States; Soto-Camarena *v*..... 965
United States; Southland Royalty Co. *v*..... 905
United States; Speech *v*..... 947
United States; Sperling *v*..... 947
United States; Sremaniak *v*..... 963
United States; Stewart *v*..... 933
United States; Swiderski *v*..... 933
United States; Taxation with Representation *v*..... 905
United States; Tempesta *v*..... 910
United States; Thompson *v*..... 908
United States; Thornton *v*..... 936
United States *v.* Timmreck..... 780
United States; Tucker *v*..... 922
United States; Volpe *v*..... 930
United States; Voorhees *v*..... 936
United States; Waldron *v*..... 934
United States; Wall *v*..... 944
United States; Warrington *v*..... 948
United States; Washington *v*..... 965
United States; Watson *v*..... 965
United States; Weinrich *v*..... 927
United States; Wesson *v*..... 965
United States; Whalen *v*..... 904
United States; Wilkins *v*..... 468
United States; Williams *v*..... 918
United States; Wills *v*..... 964
United States; Wilson *v*..... 936, 947
United States; Woodall *v*..... 951
United States; Young Buffalo *v*..... 950
United States; Younge *v*..... 910
United States; Zauner *v*..... 950
United States; Zeigler *v*..... 948
U. S. Attorney *v.* Briggs..... 940
U. S. Attorney; Goodwyn *v*..... 935
U. S. Dept. of Housing and Urban Development; Alexander *v*..... 39
U. S. District Court; Battle *v*..... 950
U. S. District Court; Hanley *v*..... 924
U. S. District Court; Hernandez *v*..... 937
U. S. District Court; Johnson *v*..... 903
U. S. District Court; Oronoz *v*..... 918

Page
U. S. District Court; Prenzler *v.* 933
U. S. District Judge; Green *v.* 904
U. S. District Judge; Imperial Distributors, Inc. *v.* 927
U. S. Magistrate; Green *v.* 930
U. S. Parole Comm'n; Cardillo *v.* 958
U. S. Secret Service; Czornonoh *v.* 912, 968
University of Chicago; Cannon *v.* 677
Utah; Bundy *v.* 926
Vaicekauskas *v.* Immigration and Naturalization Service 908
Vallejo; Packard *v.* 933
Van Cliff *v.* Pennsylvania 964
Vandalia-Butler Board of Education; Harrington *v.* 932
Vander Zee; Karabatsos *v.* 962
Van Gemert; Boeing Co. *v.* 942
Van Gordon *v.* Oregon State Board of Dental Examiners 907
Van Orden *v.* Arizona Board of Pardons and Paroles 949
Vaughn *v.* North Carolina 935
Vaughn *v.* Oregon *ex rel.* Juvenile Dept. of Multnomah County .. 934
Veal *v.* Illinois 908, 957
Velez *v.* Secretary of Health, Education, and Welfare 963
Vergara *v.* Chairman, Merit Systems Protection Board 905
Veterans' Administration; DiSilvestro *v.* 936
Veterans' Administration; Lovallo *v.* 937
Village. See name of village.
Villanueva *v.* Immigration and Naturalization Service 943
Virginia; Croatan Books, Inc. *v.* 966
Virginia; Elam *v.* 918
Virginia; Moore *v.* 909
Virginia; Smith *v.* 967
Virgin Islands; John *v.* 931
Vitek *v.* Jones 922, 960
Volpe *v.* United States 930
Von Byrd *v.* Texas 967
Voorhees *v.* United States 936
Voyles *v.* Mississippi 956
Wagner Electric Corp.; Rudolph *v.* 924
Wainwright; Spenkelink *v.* 937
Wainwright; Yost *v.* 922
Waldron *v.* United States 934
Walker *v.* Newgent 906
Walker *v.* Ohio 924
Wall *v.* United States 944
Walls *v.* Tubbs 960
Walton *v.* Small Business Administration 917

	Page
Wandel, *In re*	929
Warden. See also name of warden.	
Warden *v.* Kansas	948
Warehousemen *v.* Standard Brands, Inc.	957
Warrington *v.* United States	948
Washington *v.* Cupp	909
Washington; Finnegan *v.*	917
Washington *v.* Florida	937
Washington *v.* Mississippi	916
Washington; Pleasant *v.*	935
Washington *v.* United States	965
Waterhouse; Shannon *v.*	917
Watkins; Biles *v.*	953
Watson *v.* United States	965
Webb *v.* Balson	964
Weddington *v.* Georgia	911
Weinger *v.* Illinois	923
Weinrich *v.* United States	927
Welch *v.* Celebrezze	918
Wesson *v.* United States	965
Western Communications, Inc. *v.* Federal Communications Comm'n	931
Westmoreland County; Fiore *v.*	923
Whalen *v.* United States	904
Wheeler Dealers, Inc. *v.* Raleigh Industries of America	924
White; Green *v.*	925
White *v.* Office of Personnel Management	919
Whorton; Kentucky *v.*	786
Wilkins *v.* United States	468
Williams *v.* Brown	930
Williams *v.* Illinois	911
Williams *v.* Port Authority of New York and New Jersey	945
Williams *v.* United States	918
Wills *v.* United States	964
Wilson *v.* Ohio	945
Wilson *v.* United States	936, 947
Wine *v.* Indiana	907
Winter; Strouse *v.*	945
Wisconsin *v.* Illinois	921
Wise County Housing and Redevelopment Authority; Rudder *v.*	939
Wolfish; Bell *v.*	520
Wood *v.* Jeffes	957
Woodall *v.* United States	951
Wyrick; Green *v.*	912
Yamasaki; Califano *v.*	959

	Page
York; Smith *v.*	908
Yost *v.* Wainwright	922
Young *v.* Conn	949
Young *v.* Garrettson	950
Young; Gonzalez *v.*	600
Young *v.* Indiana	950
Young; Platel *v.*	925
Young Buffalo *v.* United States	950
Younge *v.* United States	910
Zant; Berryhill *v.*	967
Zarinsky *v.* New Jersey	924
Zauner *v.* United States	950
Zeigler *v.* United States	948
Zepeda *v.* Stahl	909

TABLE OF CASES CITED

Page

Aaron v. State, 275 A. 2d 791 376
Abington School Dist. v. Schempp, 374 U. S. 203 77
Abrahamson v. Fleschner, 568 F. 2d 862 475, 741
Abrams v. United States, 250 U. S. 616 185
ACF Industries, Inc. v. EEOC, 439 U. S. 1081 176, 179
Adams v. Richardson, 156 U. S. App. D. C. 267 707
Adams Mfg. Co. v. Storen, 304 U. S. 307 446, 448
Adderley v. Florida, 385 U. S. 39 552, 573
Adler v. Board of Ed., 342 U. S. 485 77
Afroyim v. Rusk, 387 U. S. 253 75
Aguayo v. Richardson, 473 F. 2d 1090 623, 670
Albemarle Paper Co. v. Moody, 422 U. S. 405 758
Alden-Rochelle, Inc. v. ASCAP, 80 F. Supp. 888 11, 33
Allen v. State Bd. of Elections, 393 U. S. 544 621, 690, 692, 698, 703, 728, 729, 737
Almota Farmers Elevator Co. v. United States, 409 U. S. 470 511
Alvarado v. El Paso Independent School Dist., 445 F. 2d 1011 697
American Communications Assn. v. Douds, 339 U. S. 382 582
American Fire & Cas. Co. v. Finn, 341 U. S. 6 747
American Ship Building Co. v. NLRB, 380 U. S. 300 497
Anderson v. San Francisco Unified School Dist., 357 F. Supp. 248 697

Page

Andrews v. Maher, 525 F. 2d 113 623, 670
Anonymous Adoption, In re, 177 Misc. 683 383
Anti-Fascist Committee v. McGrath, 341 U. S. 123 580
Apodaca v. Oregon, 406 U. S. 404 136, 137, 140
Application of United States, 563 F. 2d 637 255
Arizona v. New Mexico, 425 U. S. 794 145
Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U. S. 252 99, 100, 120, 132
Armstrong v. Manzo, 380 U. S. 545 414
Ashwander v. TVA, 297 U. S. 288 744
Associated Press v. NLRB, 301 U. S. 103 197
Associated Press v. United States, 326 U. S. 1 197, 203
Association of Data Processing Service Orgs. v. Federal Home Loan Bank Bd., 568 F. 2d 478 741
Atchison, T. & S. F. R. Co. v. Scarlett, 300 U. S. 471 295
Atlantic Cleaners & Dyers v. United States, 286 U. S. 427 449
Automatic Radio Mfg. Co. v. Hazeltine Research, Inc., 339 U. S. 827 9, 28, 29
Auto Workers v. Hoosier Corp., 383 U. S. 696 477, 479
Ayer & Lord Tie Co. v. Kentucky, 202 U. S. 409 442
Baker v. Carr, 369 U. S. 186 120, 737, 745
Baker v. United States Steel Corp., 492 F. 2d 1074 228, 233
Baldwin v. Franks, 120 U. S. 678 662

Page

Baldwin v. Montana Fish & Game Comm'n, 436 U. S. 371 335, 339, 341, 342, 344
Baldwin v. New York, 399 U. S. 66 134, 137, 138
Ballew v. Georgia, 435 U. S. 223 133, 134, 136–138, 140
Ballinger v. Democrat Co., 203 Iowa 1095 166
Bantam Books, Inc. v. Sullivan, 372 U. S. 58 441
Barney v. New York City, 193 U. S. 430 659
Barrick Realty, Inc. v. Gary, 354 F. Supp. 126 110
Bates v. Little Rock, 361 U. S. 516 570
Batterton v. Francis, 432 U. S. 416 295, 302, 315
Battle v. Anderson, 564 F. 2d 388 543, 572
Beauharnais v. Illinois, 343 U. S. 250 158
Beckley Newspapers Corp. v. Hanks, 389 U. S. 81 200
Bell v. Hood, 327 U. S. 678 476, 733, 735
Benjamins v. British European Airways, 572 F. 2d 913 741
Berger v. Freeman Tribune Publishing Co., 132 Iowa 290 165
Berger v. New York, 388 U. S. 41 240, 251, 272, 275, 276
Berger v. Superior Court, 109 Ariz. 506 375
Bertrand v. Orkin Exterminating Co., 419 F. Supp. 1123 765
Bertsch v. Ford Motor Co., 415 Supp. 619 760
Beverly, In re, 342 So. 2d 481 432
Bijeol v. Benson, 404 F. Supp. 595 560
Billet v. Times-Democrat Publishing Co., 107 La. 751 165
Bivens v. Six Federal Narcotics Agents, 403 U. S. 388 260
Blackmon v. Blackledge, 541 F. 2d 1070 375
Blackshear Residents Org. v. Housing Authority of Austin, 347 F. Supp. 1138 696, 724, 726

Page

Blocker v. United States, 110 U. S. App. D. C. 41 429
Bloom v. Illinois, 391 U. S. 194 536
Blount v. Harris, 593 F. 2d 336 43
Blue Chip Stamps v. Manor Drug Stores, 421 U. S. 723 176, 692, 706, 736, 748, 774
Blythe v. Hinckley, 180 U. S. 333 72
Board of Comm'rs v. United States, 308 U. S. 343 476, 477, 480
Board of Trustees v. United States, 289 U. S. 48 448
Bob-Lo Excursion Co. v. Michigan, 333 U. S. 28 456
Bohan v. Record Publishing Co., 1 Cal. App. 429 166
Bolger v. Laventhol, Krekstein, Horwath & Horwath, 381 F. Supp. 260 475
Bond v. United States, 397 F. 2d 162 375
Bonner v. Coughlin, 517 F. 2d 1311 576
Bossier Parish School Bd. v. Lemon, 370 F. 2d 847 696, 701, 702, 725, 726
Boston Stock Exchange v. State Tax Comm'n, 429 U. S. 318 455
Bounds v. Smith, 430 U. S. 817 523, 570, 571
Bowling v. State, 458 S. W. 2d 639 376
Bowman v. Chicago & N. R. Co., 115 U. S. 611 659
Bowman v. Chicago & N. R. Co., 125 U. S. 465 448
Boyd v. United States, 116 U. S. 616 262
Brady v. Maryland, 373 U. S. 83 237
Brandenburg v. Ohio, 395 U. S. 444 464, 570, 573
Braniff Airways v. Nebraska Bd. of Equalization, 347 U. S. 590 442, 444, 445, 447
Branzburg v. Hayes, 408 U. S. 665 189, 210
Bratton v. Shiffrin, 585 F. 2d 223 741

Page

Brenneman v. Madigan, 343 F. Supp. 128 532
Briggs v. Byrd, 34 N. C. 377 166
Brinegar v. United States, 338 U. S. 160 271
Brouk v. Managed Funds, Inc., 286 F. 2d 901 476
Brown v. Ballas, 331 F. Supp. 1033 104
Brown v. Blake & Bane, Inc., 402 F. Supp. 621 104
Brown v. Board of Ed., 347 U. S. 483 77, 81, 351, 727
Brown v. Bullock, 194 F. Supp. 207 475
Brown v. GSA, 425 U. S. 820 711
Brown v. Lo Duca, 307 F. Supp. 102 108
Brown v. United States, 263 U. S. 78 509
Brown v. Western R. Co. of Ala., 338 U. S. 294 479
Burnett v. New York Central R. Co., 380 U. S. 424 764
Burns v. Alcala, 420 U. S. 575 659
Burns v. United States, Civ. 4–76–237 (DC Minn.) 43
Burnside v. State, 473 S. W. 2d 697 376
Butler v. Gazette Co., 119 App. Div. 767 166
Butner v. United States, 440 U. S. 48 477, 486
Buttfield v. Stranahan, 192 U. S. 470 448
C., In re, 43 N. Y. 2d 708 385
C., In re, 56 App. Div. 2d 627 384
Caban v. Mohammed, 441 U. S. 380 356, 359, 360, 362, 366, 367, 747
Calhoon v. Harvey, 379 U. S. 134 707, 738, 740
Califano v. Goldfarb, 430 U. S. 199 394, 747
Califano v. Jobst, 434 U. S. 47 412
Califano v. Sanders, 430 U. S. 99 317
Califano v. Webster, 430 U. S. 313 410
California Dept. of Human Resources v. Java, 402 U. S. 121 673

Page

Campbell v. McGruder, 188 U. S. App. D. C. 258 524, 532, 540, 543, 568, 569, 572
Caramico v. Secretary, Dept. of HUD, 509 F. 2d 694 43
Carleson v. Remillard, 406 U. S. 598 673
Carl Zeiss Stiftung v. V. E. B. Carl Zeiss, Jena, 40 F. R. D. 318 193
Carnley v. Cochran, 369 U. S. 506 373, 377
Carroll v. United States, 267 U. S. 132 558
Carter v. Greenhow, 114 U. S. 317 659
Carter v. Stanton, 405 U. S. 669 673
Case Co. v. Borak, 377 U. S. 426 316, 317, 475, 477, 692, 698, 704, 707, 711, 717, 718, 735, 736, 738, 739
Central Greyhound Lines v. Mealey, 334 U. S. 653 444
Central R. Co. v. Pennsylvania, 370 U. S. 607 446, 452
Cervantes v. Time, Inc., 464 F. 2d 986 209
Chaplinsky v. New Hampshire, 315 U. S. 568 158
Chapman v. California, 386 U. S. 18 791
Chapman v. Houston Welfare Rights Org., 441 U. S. 600 697, 737, 739
Chapman v. Rhodes, 434 F. Supp. 1007 543, 572
Charles River Park "A," Inc. v. Department of HUD, 171 U. S. App. D. C. 286 290, 312
Chaunt v. United States, 364 U. S. 350 424
Chemical Workers v. Pittsburgh Plate Glass Co., 404 U. S. 157 496, 497, 501, 505
Cheng Fan Kwok v. INS, 392 U. S. 206 265
Chevron Oil Co. v. Huson, 404 U. S. 97 416
Chicago Bd. of Trade v. United States, 246 U. S. 231 23
Chrysler Corp. v. Brown, 441 U. S. 281 741, 918, 919

Page

Chrystal Springs Land Co. v. Los Angeles, 177 U. S. 169 659
Chy Lung v. Freeman, 92 U. S. 275 450
Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U. S. 402 317
City. See name of city.
Clarke v. Deckebach, 274 U. S. 392 73
Clearfield Trust Co. v. United States, 318 U. S. 363 746
Cleveland Leader Printing Co. v. Nethersole, 84 Ohio St. 118 167
Cobb v. Oklahoma Publishing Co., 42 Okla. 314 167
Cobbledick v. United States, 309 U. S. 323 232
Coffin v. United States, 156 U. S. 432 533, 790
Cohen v. California, 403 U. S. 15 184, 441
Cole v. Arkansas, 333 U. S. 196 953, 954
Collins v. Schoonfield, 344 F. Supp. 257 566
Colonnade Catering Corp. v. United States, 397 U. S. 72 264
Columbia Broadcasting System, Inc. v. Democratic National Comm., 412 U. S. 94 167, 168, 178, 190, 207, 208
Commonwealth. See also name of Commonwealth.
Commonwealth v. Garnett, 458 Pa. 4 376
Commonwealth v. Murray, 359 Mass. 541 376
Complete Auto Transit, Inc. v. Brady, 430 U. S. 274 445, 451
Connally v. Georgia, 429 U. S. 245 255
Conner v. Standard Publishing Co., 183 Mass. 474 166
Conroy v. Fall River Herald News Co., 306 Mass. 488 166
Continental T. V., Inc. v. GTE Sylvania Inc., 433 U. S. 36 8, 13, 20
Contractors Assn. of Eastern Pa. v. Secretary of Labor, 442 F. 2d 159 304, 305

Page

Cook v. East Shore Newspapers, 327 Ill. App. 559 165
Cook v. Globe Printing Co., 227 Mo. 471 166
Cooke v. United States, 267 U. S. 517 536
Cool v. United States, 409 U. S. 100 790
Cooley v. Board of Wardens, 12 How. 299 326, 457
Coolidge v. New Hampshire, 403 U. S. 443 255, 260
Cooper v. Pate, 378 U. S. 546 545
Corey L. v. Martin L., 45 N. Y. 2d 383 387
Cort v. Ash, 422 U. S. 66 316, 478, 688–694, 698, 703, 707–709, 711, 717, 719, 731, 739–743, 749
Costanzo v. Tillinghast, 287 U. S. 341 774
Costello v. United States, 350 U. S. 359 218
County. See name of county.
Courier-Journal Co. v. Phillips, 142 Ky. 372 166
Cox v. Louisiana, 379 U. S. 536 552, 573
Cox v. New Hampshire, 312 U. S. 569 552, 573
Craig v. Boren, 429 U. S. 190 354, 359, 362, 388
Cramer v. General Tel. & Electronics Corp., 582 F. 2d 259 482, 485
Crane v. New York, 239 U. S. 195 73
Crim v. Glover, 338 F. Supp. 823 108
Crosslin v. Mountain States Tel. & Tel. Co., 400 U. S. 1004 765
Cruz v. Beto, 405 U. S. 319 545, 547, 552, 590
Cumming v. Richmond County Bd. of Ed., 175 U. S. 528 705, 724
Cummings v. Missouri, 4 Wall. 277 582, 590
Curtis Publishing Co. v. Butts, 388 U. S. 130 156, 159–162, 169, 171, 195, 200, 203

Page

Cyrowski v. Polish-American Publishing Co., 196 Mich. 648 166
Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282 441
Dalia v. United States, 441 U. S. 238 703, 929, 939
Damico v. California, 389 U. S. 416 674
Dandridge v. Williams, 397 U. S. 471 351, 412, 543, 673, 674
Daniel v. Teamsters, 561 F. 2d 1223 742
Data Processing Service v. Camp, 397 U. S. 150 100
Daughtery v. Harris, 476 F. 2d 292 560
David A. C., In re, 43 N. Y. 2d 708 385
David Andrew C., In re, 56 App. Div. 2d 627 384
Davis v. Marxhausen, 103 Mich. 315 166
Davis v. Schuchat, 166 U. S. App. D. C. 351 208
Davis v. Southeastern Community College, 574 F. 2d 1158 741
Davis v. United States, 328 U. S. 582 264
Davis v. Valley Distributing Co., 522 F. 2d 827 760, 764
Dawson v. U. S. Dept. of HUD, 428 F. Supp. 328 48
Dayton Bd. of Ed. v. Brinkman, 433 U. S. 406 25
Deckert v. Independence Shares Corp., 311 U. S. 282 735
De Gideo v. Sperry-Univac Co., 415 F. Supp. 227 761, 763
Deitrick v. Greaney, 309 U. S. 190 476, 477, 735
Dennis v. United States, 384 U. S. 855 221–225, 228, 236, 237
Denton v. Commonwealth, 383 S. W. 2d 681 431
Department of Air Force v. Rose, 425 U. S. 352 290
DeStefano v. Woods, 392 U. S. 631 136
De Sylva v. Ballentine, 351 U. S. 570 477, 478

Page

Detainees of Brooklyn House of Detention v. Malcolm, 520 F. 2d 392 528, 532, 572
Detroit Edison Co. v. NLRB, 440 U. S. 301 490
De Veau v. Braisted, 363 U. S. 144 537, 565
Devine v. Los Angeles, 202 U. S. 313 659
Di Santo v. Pennsylvania, 273 U. S. 34 326
District of Columbia v. Carter, 409 U. S. 418 670
District of Columbia v. Clawans, 300 U. S. 617 138
Division 1287, Amalgamated Transit Union v. Kansas City Area Transp. Auth., 582 F. 2d 444 746
Doherty v. United States, 404 U. S. 28 469
Dombrowski v. Pfister, 380 U. S. 479 187
Dothard v. Rawlinson, 433 U. S. 321 681
Douglas v. Seacoast Products, Inc., 431 U. S. 265 334, 335, 339, 341, 342, 344
Duke Power Co. v. Carolina Environmental Study Group, 438 U. S. 59 99, 120, 132
Duncan v. Louisiana, 391 U. S. 145 132, 134–138
Duran v. Elrod, 542 F. 2d 998 524
Duren v. Missouri, 439 U. S. 357 901, 902
East Bay Union of Machinists v. NLRB, 116 U. S. App. D. C. 198 496
Eastern Railroad Presidents Conf. v. Noerr Motor Freight, Inc., 365 U. S. 127 464, 466
Eaton v. Tulsa, 415 U. S. 697 955
Eccles v. Peoples Bank, 333 U. S. 426 744
Edelman v. Jordan, 415 U. S. 651 390, 644, 660, 673
Edwards v. United States, 312 U. S. 473 778
Eisenstadt v. Baird, 405 U. S. 438 535

Page

Elkins v. Moreno, 435 U. S. 647 458–461
Elkins v. United States, 364 U. S. 206 175
EPA v. Mink, 410 U. S. 73 193, 290, 293
Erhardt, In re, 27 App. Div. 2d 836 413
Erie R. Co. v. Tompkins, 304 U. S. 64 742
Ernst & Ernst v. Hochfelder, 425 U. S. 185 692, 774, 775
Esplin v. Hirschi, 402 F. 2d 94 476
Estelle v. Williams, 425 U. S. 501 533, 790, 966
Ethyl Gasoline Corp. v. United States, 309 U. S. 436 28
Evco v. Jones, 409 U. S. 91 446, 448
Examining Board v. Flores de Otero, 426 U. S. 572 73, 84, 615, 636, 649, 674
Ex parte. See name of party.
F., In re, 40 N. Y. 2d 103 392
Fair Housing Council v. Eastern Bergen Multiple Listing Service, 422 F. Supp. 1071 108, 115
Farkas v. Texas Instrument, Inc., 375 F. 2d 629 305, 306
Farmer v. Philadelphia Electric Co., 329 F. 2d 3 305, 306
Farrar v. Tribune Publishing Co., 57 Wash. 2d 549 166
FAA Administrator v. Robertson, 422 U. S. 255 290, 300
FCC v. Schreiber, 381 U. S. 279 315
FHA v. The Darlington, Inc., 358 U. S. 84 300
Feeley v. Sampson, 570 F. 2d 364 524, 532, 540, 567, 569
Ferguson v. Kroger Co., 545 F. 2d 1034 761
Ferraro v. United States, 590 F. 2d 335 559
Fibreboard Paper Products Corp. v. NLRB, 379 U. S. 203 498, 500–502, 505
Firemen v. Chicago, R. I. & P. R. Co., 393 U. S. 129 337

Page

First Nat. Bank of Boston v. Bellotti, 435 U. S. 765 180, 189
Flemming v. Nestor, 363 U. S. 603 537–539, 565, 569
Flood v. Kuhn, 407 U. S. 258 736
Florida Lime & Avocado Growers v. Paul, 373 U. S. 132 344
Flying Tiger Line v. Los Angeles, 51 Cal. 2d 314 444
Foley v. Connelie, 435 U. S. 291 74–76, 80, 82–84
Fort Worth v. United States, 188 F. 2d 217 508
Foster-Fountain Packing Co. v. Haydel, 278 U. S. 1 332–334, 336, 342, 345
Foti v. INS, 375 U. S. 217 295
Fox v. HUD, 416 F. Supp. 954 114
Fox Publishing Co. v. United States, 366 U. S. 683 13
Franks v. Bowman Transportation Co., 424 U. S. 747 692
Frazier v. Cupp, 394 U. S. 731 375
Free v. Bland, 369 U. S. 663 296
Freeman v. Mills, 97 Cal. App. 2d 161 165
Frick v. Webb, 263 U. S. 326 72
Friedell v. Blakely Printing Co., 163 Minn. 226 166
Frontiero v. Richardson, 411 U. S. 677 354, 398, 747
Furman v. Georgia, 408 U. S. 238 914
Gabriele v. Chrysler Corp., 573 F. 2d 949 765
Galfand v. Chestnutt Corp., 545 F. 2d 807 481
Garland, Ex parte, 4 Wall. 333 582
Garner v. Board of Public Works, 341 U. S. 716 582
Garrett v. Hamtramck, 503 F. 2d 1236 706
Garrison v. Louisiana, 379 U. S. 64 156, 464
Gault, In re, 387 U. S. 1 425
Gautreaux v. Chicago Housing Authority, 436 F. 2d 306 697, 726
Gautreaux v. Chicago Housing Authority, 503 F. 2d 930 697

Page

Gautreaux v. Chicago Housing Authority, 265 F. Supp. 582 696, 697, 703, 726
Gautreaux v. Chicago Housing Authority, 296 F. Supp. 907 697, 726
Gautreaux v. Romney, 448 F. 2d 731 697, 703, 726
Gebbard v. United States, 408 U. S. 41 274
Geer v. Connecticut, 161 U. S. 519 325–329, 337, 339–342
General Committee v. Missouri-K.-T. R. Co., 320 U. S. 323 735
General Committee v. Southern Pacific Co., 320 U. S. 338 735
General Dynamics Corp. v. Marshall, 572 F. 2d 1211 290
General Talking Pictures Corp. v. Western Electric Co., 304 U. S. 175 140
Georgia v. Rachel, 384 U. S. 780 621–623, 669
Gerstein v. Pugh, 420 U. S. 103 526, 534, 536
Gertz v. Robert Welch, Inc., 418 U. S. 323 156, 159, 160, 162, 168, 169, 171, 175, 178, 188, 192, 200, 203
Giampetruzzi v. Malcolm, 406 F. Supp. 836 575
Gibbons v. Ogden, 9 Wheat. 1 326, 449
Gibson v. United States, 131 U. S. App. D. C. 143 225, 228
Gideon v. Wainwright, 372 U. S. 335 373
Giles v. Harris, 189 U. S. 475 659
Gilliam v. Omaha, 524 F. 2d 1013 706
Girouard v. United States, 328 U. S. 61 645
Givhan v. Western Line Consol. School Dist., 439 U. S. 410 79
Glasser v. Georgia, 315 U. S. 60 914, 916
Glona v. American Guarantee Ins. Co., 391 U. S. 73 355, 363–365
G. M. Leasing Corp. v. United States, 429 U. S. 338 264

Page

Goldman v United States, 316 U. S. 129 276, 277
Goldwater v. Ginzburg, 414 F. 2d 324 208
Gomez v. Florida State Employment Service, 417 F. 2d 569 620
Gomez v. Perez, 409 U. S. 535 351, 357, 359, 364, 365, 405
Goodrow v. Malone Telegram, Inc., 235 App. Div. 3 167
Goodrow v. Press Co., 233 App. Div. 41 167
Goodwin v. Castleton, 19 Wash. 2d 748 487
Goosby v. Osser, 409 U. S. 512 589, 590
Government Employees v. Webb, 188 U. S. App. D. C. 233 741
Graham v. Chrysler Corp., 15 FEP Cases 876 760
Graham v. Richardson, 403 U. S. 365 71, 73, 81, 84, 351
Grayned v. Rockford, 408 U. S. 104 552, 573
Greater Iowa Corp. v. McLendon, 378 F. 2d 783 476
Greco v. Orange Memorial Hospital Corp., 513 F. 2d 873 712
Green v. Ten Eyck, 572 F. 2d 1233 103
Greenbelt Cooperative Publishing Assn. v. Bresler, 398 U. S. 6 197, 200
Green Street Assn. v. Daley, 373 F. 2d 1 726
Greenwood v. Peacock, 384 U. S. 808 644, 660
Gregg v. Georgia, 428 U. S. 153 581, 592, 593, 914, 917, 937, 956, 967
Gregg Dyeing Co. v. Query, 286 U. S. 472 152
Griffin v. Richardson, 409 U. S. 1069 364
Griffiths, In re, 413 U. S. 717 73, 76, 81–85, 87–89
Griggs v. Duke Power Co., 401 U. S. 424 761
Griswold v. Connecticut, 381 U. S. 479 535

Page

Grosjean v. American Press Co., 297 U. S. 233 188, 189, 203
Hackett v. McGuire Bros., Inc., 445 F. 2d 442 98
Hagans v. Lavine, 415 U. S. 528 607, 659–661, 673, 675
Hague v. CIO, 307 U. S. 496 613, 658, 660, 667
Hains v. New York Evening Journal, 240 N. Y. S. 734 167
Halliburton Oil Well Cementing Co. v. Reily, 373 U. S. 64 149, 152
Hampton v. Holmesburg Prison Officials, 546 F. 2d 1077 532
Hannah v. Larche, 363 U. S. 420 265
Hanover Federation of Teachers v. Hanover Community School Corp., 457 F. 2d 456 464–467
Hanson v. Denckla, 357 U. S. 235 423
Harrington v. California, 395 U. S. 250 791
Harris v. Lynn, 555 F. 2d 1357 43
Hauenstein v. Lynham, 100 U. S. 483 72
Hawks v. Lazaro, 157 W. Va. 417 432
Hawthorne v. Kenbridge Recreation Assn., 341 F. Supp. 1382 696, 697, 726
Hayburn's Case, 2 Dall. 409 744
Hays v. Pacific Mail S. S. Co., 17 How. 596 441
Hearne v. De Young, 119 Cal. 670 166
Heart of Atlanta Motel, Inc. v. United States, 379 U. S. 241 150
Henderson v. Kibbe, 431 U. S. 145 784
Henderson v. Mayor of New York, 92 U. S. 259 449
Herman Schwabe, Inc. v. United States Shoe Machinery Corp., 21 F. R. D. 233 225
Herpich v. Wallace, 430 F. 2d 792 476
Hicklin v. Orbeck, 437 U. S. 518 334
Hickman v. Taylor, 329 U. S. 495 89, 177, 179, 183, 204–206

Page

Hicks v. Miranda, 422 U. S. 332 390
Hicks v. Weaver, 302 F. Supp. 619 697, 724, 726
Hill v. United States, 368 U. S. 424 783–785
Hills v. Gautreaux, 425 U. S. 284 702, 703
H. K. Porter Co. v. NLRB, 397 U. S. 99 499
Hodges, In re, 325 A. 2d 605 431
Hodges v. Klein, 412 F. Supp. 896 560
Holloway v. Arkansas, 435 U. S. 475 915, 916
Holt v. Indiana Mfg. Co., 176 U. S. 68 659
Holy Trinity Church v. United States, 143 U. S. 457 626
Home Tel. & Tel. Co. v. Los Angeles, 227 U. S. 278 659
Houchins v. KQED, Inc., 438 U. S. 1 581, 589
Howard v. W. P. Bill Atkinson Enterprises, 412 F. Supp. 610 108
H. P. Hood & Sons, Inc. v. Du Mond, 336 U. S. 525 326, 330, 339, 343, 344
Hughes v. Dempsey-Tegeler & Co., 534 F. 2d 156 742
Hughes v. Oklahoma, 441 U. S. 322 454, 939
Hughes v. Swenson, 452 F. 2d 866 375
Humphrey v. Cady, 405 U. S. 504 425
Hunt v. Washington Apple Advertising Comm'n, 432 U. S. 333 336, 343, 344
Huntington v. New York City, 193 U. S. 441 658, 659
Huron Portland Cement Co. v. Detroit, 362 U. S. 440 342
Hutto v. Finney, 437 U. S. 678 523, 543
Illinois v. Scarbaugh, 552 F. 2d 768 218, 223, 225, 228, 233
Illinois Elections Bd. v. Socialist Workers Party, 440 U. S. 173 585
Ingraham v. Wright, 430 U. S. 651 535, 536, 539, 569

Page

Inmates of Milwaukee County Jail v. Petersen, 353 F. Supp. 1157 566
Inmates of Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676 543
In re. See name of party.
International Business Machines Corp. v. United States, 298 U. S. 131 28
Interstate Consolidated St. R. Co. v. Massachusetts, 207 U. S. 79 77
Iowa Civil Rights Comm'n v. Massey-Ferguson, Inc., 207 N. W. 2d 5 765
Irvine v. California, 347 U. S. 128 247, 275, 277, 278
Jackson v. Indiana, 406 U. S. 715 425
Jacobs v. United States, 290 U. S. 13 733
Jacobson v. New York, N. H. & H. R. Co., 206 F. 2d 153 732, 746
J. D. Adams Mfg. Co. v. Storen, 304 U. S. 307 446, 448
Jefferson v. Hackney, 406 U. S. 535 673
Jencks v. United States, 353 U. S. 657 236
Jenkins v. Georgia, 418 U. S. 153 133
J. I. Case Co. v. Borak, 377 U. S. 426 316, 317, 475, 477, 692, 698, 704, 707, 711, 717, 718, 735, 736, 738, 739
Johnson v. Decker, 333 F. Supp. 88 108
Johnson v. Haydel, 278 U. S. 16 345
Johnson v. Louisiana, 406 U. S. 356 136, 137, 140
Johnson v. Railway Express Agency, Inc., 421 U. S. 454 479, 728, 736
Johnson v. United States, 333 U. S. 10 261
Johnson v. Zerbst, 304 U. S. 458 375, 376
Johnson Publishing Co. v. Davis, 271 Ala. 474 165

Page

Jones v. Alfred H. Mayer Co., 392 U. S. 409 128, 621, 641, 649, 651, 653, 690, 692, 698, 728, 736
Jones v. North Carolina Prisoners' Labor Union, 433 U. S. 119 523, 541, 545–547, 551, 552, 554, 555, 557, 568, 584
Jones v. Rath Packing Co., 430 U. S. 519 306, 315
Julian v. Kansas City Star Co., 209 Mo. 35 166
J. W., In re, 44 N. J. Super. 216 431
Kampmeier v. Nyquist, 553 F. 2d 296 742
Katz v. United States, 389 U. S. 347 247, 248, 251, 256, 275, 276, 559, 589
Katzenbach v. McClung, 379 U. S. 294 150
Kehoe v. New York Tribune, 229 App. Div. 220 167
Kennedy v. Mendoza-Martinez, 372 U. S. 144 536–539, 564, 565, 568, 569, 586–588, 590, 592
Kenosha v. Bruno, 412 U. S. 507 728
Keppel v. Tiffin Savings Bank, 197 U. S. 356 779
Ker v. California, 374 U. S. 23 247
Keyes v. School Dist. No. 1, Denver, Colo., 413 U. S. 189 77
Keyishian v. Board of Regents, 385 U. S. 589 574, 747
Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U. S. 211 34
Kimball Laundry Co. v. United States, 338 U. S. 1 511
King v. Smith, 392 U. S. 309 606, 659, 674, 739
Kipperman v. Academy Life Ins. Co., 554 F. 2d 377 742
Kleindienst v. Mandel, 408 U. S. 753 552
Kleppe v. New Mexico, 426 U. S. 529 339, 342, 344
Kline v. Burke Constr. Co., 260 U. S. 226 747

Page

Knetsch v. United States, 364 U. S. 361 532
K–91, Inc. v. Gershwin Publishing Corp., 372 F. 2d 1 14
Kohn v. P & D Publishing Co., 169 App. Div. 580 167
Kremens v. Bartley, 431 U. S. 119 526
Kulko v. California Superior Court, 436 U. S. 84 423
Kusper v. Pontikes, 414 U. S. 51 570
L. v. Martin L., 45 N. Y. 2d 383 387
Labine v. Vincent, 401 U. S. 532 352, 357
Lacoste v. Louisiana Dept. of Conservation, 263 U. S. 545 332, 336, 342, 344
Lake Country Estates v. Tahoe Regional Planning Agency, 440 U. S. 391 527
Lalli v. Lalli, 439 U. S. 259 352, 355–360, 363, 364, 366, 393, 403, 405
Lancour v. Herald & Globe Assn., 112 Vt. 471 166
Land v. Commonwealth, 211 Va. 223 376
Lanza v. New York, 370 U. S. 139 557, 558, 590
Las Vegas Sun, Inc. v. Franklin, 74 Nev. 282 167
Lau v. Nichols, 414 U. S. 563 702
Lausche v. Commissioner of Public Welfare, 302 Minn. 65 431
Leather's Best, Inc. v. S. S. Mormaclynx, 451 F. 2d 800 443
Lee v. Nyquist, 318 F. Supp. 710 111
Lee v. Washington, 390 U. S. 333 545, 590
Leis v. Flynt, 439 U. S. 438 535, 580
Lemon v. Bossier Parish School Bd., 240 F. Supp. 709 697, 702
Letter Carriers v. Austin, 418 U. S. 264 200
Levitt v. Johnson, 334 F. 2d 815 480
Levy v. Louisiana, 391 U. S. 68 364

Page

Lewis v. Transamerica Corp., 575 F. 2d 237 476, 741
Liberty Mutual Life Ins. Co. v. Wetzel, 424 U. S. 737 222
Linda R. S. v. Richard D., 410 U. S. 614 99
Lindsey v. Evening Journal Assn., 10 N. J. Misc. 1275 167
Linmark Associates, Inc. v. Willingboro, 431 U. S. 85 111
Linn v. Plant Guard Workers, 383 U. S. 53 200
Lloyd v. Regional Transportation Authority, 548 F. 2d 1277 742
Local 519, Amalgamated Transit Union v. Greater Portland Transit Dist., 589 F. 2d 1 741, 746
Local 519, Amalgamated Transit Union v. LaCrosse Municipal Transit Utility, 585 F. 2d 1340 746
Lockerty v. Phillips, 319 U. S. 182 747
Lockport v. Citizens for Community Action, 430 U. S. 259 351
Logan v. Richard E. Carmack & Assoc., 368 F. Supp. 121 104
Logan v. United States, 144 U. S. 263 662
Lopez v. United States, 373 U. S. 427 260, 277
Los Angeles Dept. of Water & Power v. Manhart, 435 U. S. 702 403
Love v. Pullman Co., 404 U. S. 522 756, 761, 764, 765
Lucas v. Colorado General Assembly, 377 U. S. 713 416
Lynch v. Household Finance Corp., 405 U. S. 538 615, 649, 657, 660, 667, 674
Machinists v. Central Airlines, 372 U. S. 682 692, 704, 706, 734
Machinists v. Street, 367 U. S. 740 265
Mackin v. United States, 117 U. S. 348 590
Magalotti v. Ford Motor Co., 418 F. Supp. 430 759, 760

Page

Main Road v. Aytch, 565 F. 2d 54 524, 546
Malpica-Orsini, In re, 36 N. Y. 2d 568 384, 385, 390–392, 403, 409, 411
Manchester v. Massachusetts, 139 U. S. 240 342
Manicone v. Corso, 365 F. Supp. 576 566
Mapp v. Ohio, 367 U. S. 643 264
Marcera v. Chinlund, 595 F. 2d 1231 560
Marin City Council v. Marin County Redevelopment Agency, 416 F. Supp. 700 114
Marks v. United States, 430 U. S. 188 139
Marron v. United States, 275 U. S. 192 260
Marshall v. Barlow's, Inc., 436 U. S. 307 263, 264
Martin v. Struthers, 319 U. S. 141 573
Massachusetts Bd. of Retirement v. Murgia, 427 U. S. 307 80, 351
Massachusetts Mutual Life Ins. Co. v. Ludwig, 426 U. S. 479 25
Mathews v. Eldridge, 424 U. S. 319 425
Mathews v. Lucas, 427 U. S. 495 352, 365, 393, 404
May v. Anderson, 345 U. S. 528 423
Mazer v. Stein, 347 U. S. 201 140
McAdams v. Thermal Industries, 428 F. Supp. 156 761
McBurney v. Times Publishing Co., 93 R. I. 331 166
McCall v. Shapiro, 416 F. 2d 246 623
McCarthy v. Arndstein, 266 U. S. 34 182
McCarthy v. United States, 394 U. S. 459 784
McCollum v. Board of Ed., 333 U. S. 203 77
McCready v. Virginia, 94 U. S. 391 72, 342
McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U. S. 10 265

Page

McDaniel v. University of Chicago, 548 F. 2d 689 742
McGhee v. Ford Motor Co., 15 FEP Cases 869 760
McGhee v. Nashville Special School Dist., 11 Race Rel. L. Rep. 698 697
McGinnis v. Royster, 410 U. S. 263 582
McKee v. Rogers, 18 Del. Ch. 81 487
McLaughlin v. Florida, 379 U. S. 184 351
McNutt v. General Motors Acceptance Corp., 298 U. S. 178 612
Meachum v. Fano, 427 U. S. 215 523, 541, 545, 547, 548, 580
Meat Cutters v. Jewel Tea Co., 381 U. S. 676 495, 500
Mendelsohn's Adoption, In re, 180 Misc. 147 388
Mercoid Corp. v. Mid-Continent Investment Co., 320 U. S. 661 28
Meyer v. Nebraska, 262 U. S. 390 77, 414, 535
Miami Herald Publishing Co. v. Tornillo, 418 U. S. 241 167, 168, 178, 190, 192, 207, 208
Michelin Tire Corp. v. Wages, 423 U. S. 276 449
Middendorf v. Henry, 425 U. S. 25 527
Miller v. Carson, 563 F. 2d 741 524, 560
Miller v. Carson, 401 F. Supp. 835 566, 575
Miller v. Poretsky, 409 F. Supp. 837 108
Miller v. State, 251 Md. 362 376
Miller v. Twomey, 479 F. 2d 701 591
Miller v. Youakim, 440 U. S. 125 673
Mills v. Alabama, 384 U. S. 214 186
Milwaukee Towne Corp. v. Loew's Inc., 190 F. 2d 561 30
Mine Workers v. Illinois Bar Assn., 389 U. S. 217 466

Page

Miranda v. Arizona, 384 U. S. 436 370, 372–374, 377
Missouri v. Holland, 252 U. S. 416 331, 341, 342
Mitchell v. Mid-Continent Spring Co., 466 F. 2d 24 765
Mitchell v. Robert DeMario Jewelry, 361 U. S. 288 735
Mitchum v. Foster, 407 U. S. 225 660
Monell v. New York City Dept. of Social Services, 436 U. S. 658 645, 660, 700, 727
Monitor Patriot Co. v. Roy, 401 U. S. 265 200
Monongahela Navigation Co. v. United States, 148 U. S. 312 510
Monroe v. Pape, 365 U. S. 167 645, 662, 667, 700, 727, 728
Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U. S. 246 692
Moore v. Chesapeake & O. R. Co., 291 U. S. 205 732
Moore v. East Cleveland, 431 U. S. 494 414, 569
Moorer v. Department of HUD, 561 F. 2d 175 48
Moorman Mfg. Co. v. Bair, 437 U. S. 267 452, 454, 455
Morgan v. Parham, 16 Wall. 471 442
Morris v. Gressette, 432 U. S. 491 729
Morrissey v. Brewer, 408 U. S. 471 569, 590
Morton v. Ruiz, 415 U. S. 199 302, 303, 313
Moses v. Burgin, 445 F. 2d 369 476
Motorola, Inc. v. EEOC, 460 F. 2d 1245 765
Mt. Healthy Bd. of Ed. v. Doyle, 429 U. S. 274 79, 476, 700
Muniz v. Hoffman, 422 U. S. 454 626
Murray v. The Charming Betsy, 2 Cranch 64 265
Muskrat v. United States, 219 U. S. 346 744
M. Witmark & Sons v. Jenson, 80 F. Supp. 843 11

Page

Nalle v. Oyster, 230 U. S. 165 163
Nardone v. United States, 308 U. S. 338 254
Nashville I–40 Steering Comm. v. Ellington, 387 F. 2d 179 697
NAACP v. Alabama ex rel. Patterson, 357 U. S. 449 763
NAACP v. Button, 371 U. S. 415 187, 464, 466
NAACP v. Wilmington Medical Center, 453 F. Supp. 280 688
National Broadcasting Co. v. United States, 319 U. S. 190 308
NLRB v. Erie Resistor Corp., 373 U. S. 221 496
NLRB v. Insurance Agents, 361 U. S. 477 496, 497
NLRB v. Iron Workers, 434 U. S. 335 497
NLRB v. Ladish Co., 538 F. 2d 1267 494
NLRB v. Robbins Tire & Rubber Co., 437 U. S. 214 290
NLRB v. Sears, Roebuck & Co., 421 U. S. 132 194, 209, 290
NLRB v. Steelworkers, 357 U. S. 357 496
NLRB v. Wyman-Gordon Co., 394 U. S. 759 303
National League of Cities v. Usery, 426 U. S. 833 449
National Railroad Corp. v. Railroad Passengers, 414 U. S. 453 692, 698, 707, 711, 717, 719, 738
National Society of Professional Engineers v. United States, 435 U. S. 679 8, 19, 20, 35, 36
Near v. Minnesota ex rel. Olson, 283 U. S. 697 158
Nedd v. United Mine Workers, 556 F. 2d 190 742
Nelson v. Miranda, 413 U. S. 902 83
New Jersey v. Portash, 440 U. S. 450 133
New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U. S. 96 569
New Orleans v. Dukes, 427 U. S. 297 589

Page
New York City v. Sage, 239 U. S. 57 511
New York City Transit Authority v. Beazer, 440 U. S. 568 351
New York Stock Exchange v. Bloom, 183 U. S. App. D. C. 217 742
New York Times Co. v. Jascalevich, 439 U. S. 1331 210
New York Times Co. v. Sullivan, 376 U. S. 254 156, 159–161, 163, 169–171, 175, 178, 181, 182, 187, 189, 191–193, 197, 199–204, 206–208
Nickel v. Shatterproof Glass Corp., 424 F. Supp. 884 760, 764
1975–2 Grand Jury Investigation, In re, 566 F. 2d 1293 228
Norris v. Frame, 585 F. 2d 1183 524
North Carolina v. Butler, 441 U. S. 369 929
Northcross v. Memphis Bd. of Ed., 412 U. S. 427 756
Northern Pacific R. Co. v. United States, 356 U. S. 1 8, 20
Northwest Airlines v. Minnesota, 322 U. S. 292 443, 452, 455
Norwood v. Harrison, 410 F. Supp. 133 700
Nyquist v. Mauclet, 432 U. S. 1 73, 74, 76, 82–84
O'Brien v. Skinner, 414 U. S. 524 589, 590
O'Bryan v. Saginaw County, 437 F. Supp. 582 566
Ocala Star-Banner Co. v. Damron, 401 U. S. 295 200
Occidental Life Ins. Co. v. EEOC, 432 U. S. 355 763
O'Connor v. Donaldson, 422 U. S. 563 429
Ohio ex rel. Clarke v. Deckebach, 274 U. S. 392 73
Ohio Oil Co. v. Indiana, 177 U. S. 190 330
Olmstead v. United States, 277 U. S. 438 277
Olson v. Rembrandt Printing Co., 511 F. 2d 1228 756, 761
Olson v. United States, 292 U. S. 246 510, 516
On Lee v. United States, 343 U. S. 747 276, 277
Oregon v. Hass, 420 U. S. 714 376
Orlando F., In re, 40 N. Y. 2d 103 392
Orr v. Orr, 440 U. S. 268 354, 359, 398, 747, 901
Orsini v. Blasi, 423 U. S. 1042 390
Osborn v. United States, 385 U. S. 323 277
Otero v. New York City Housing Auth., 484 F. 2d 1122 706
Ott v. Mississippi Valley Barge Line, 336 U. S. 169 442, 444, 446, 452
Oubichon v. North American Rockwell Corp., 482 F. 2d 569 765
Oyama v. California, 332 U. S. 633 73, 351
Pacific Maritime Assn. v. Quinn, 465 F. 2d 108 761
Palmore v. United States, 411 U. S. 389 265
Parham v. Hughes, 441 U. S. 347 405, 415
Paris Adult Theatre I v. Slaton, 413 U. S. 49 140
Parker v. Brown, 317 U. S. 341 326
Parker v. General Telephone Co., 476 F. 2d 595 765
Parlane Sportswear Co. v. Weinberger, 381 F. Supp. 410 48
Patsone v. Pennsylvania, 232 U. S. 138 72, 342
Patterson v. Morrisette, 564 F. 2d 1109 524
Patterson v. New York, 432 U. S. 197 428, 430
Paul v. Davis, 424 U. S. 693 535, 580
Paul v. United States, 371 U. S. 245 296
Paxton v. Woodward, 31 Mont. 195 166
Payne v. United States, 508 F. 2d 1391 247
Peck v. Tribune Co., 214 U. S. 185 159

Page

Peek v. State, 239 Ga. 422 376
Pell v. Procunier, 417 U. S. 817 523, 541, 545–548, 551, 552, 554, 590
Penn El v. Riddle, 399 F. Supp. 1059 560
Pennsylvania v. West Virginia, 262 U. S. 553 330, 331, 340, 341
Pennsylvania Federation v. Pennsylvania R. Co., 267 U. S. 203 733
Pennsylvania R. Co. v. Railroad Labor Bd., 261 U. S. 72 733
Pennzoil Co. v. FPC, 534 F. 2d 627 290
People v. Brooks, 51 Ill. 2d 156 376
People v. Johnson, 70 Cal. 2d 541 375
People v. Weaver, 179 Colo. 331 375
Perkins v. Lukens Steel Co., 310 U. S. 113 306
Perkins v. Smith, 370 F. Supp. 134 74
Perma Life Mufflers, Inc. v. International Parts Corp., 392 U. S. 134 34
Pfister v. Milwaukee Free Press Co., 139 Wis. 627 167
Philadelphia v. New Jersey, 437 U. S. 617 326, 331, 337
Philadelphia v. Westinghouse Electric Corp., 210 F. Supp. 486 227
Piascik v. Cleveland Museum of Art, 426 F. Supp. 779 706
Pickering v. Board of Ed., 391 U. S. 563 79, 465
Pierce v. Society of Sisters, 268 U. S. 510 77
Pike v. Bruce Church, Inc., 397 U. S. 137 326, 331, 336, 343, 345
Pinckney v. Northampton County, 433 F. Supp. 373 761
Piper v. Chris-Craft Industries, 430 U. S. 1 692, 698, 741
Pittsburgh Plate Glass Co. v. United States, 360 U. S. 395 221, 223, 225, 228

Page

Pittsburgh Press Co. v. Human Relations Comm'n, 413 U. S. 376 168, 190
Planned Parenthood of Central Mo. v. Danforth, 428 U. S. 52 404
Plessy v. Ferguson, 163 U. S. 537 705
Poe v. Ullman, 367 U. S. 497 569
Porter v. Warner Holding Co., 328 U. S. 395 735
Porter Co. v. NLRB, 397 U. S. 99 499
Porterfield v. Webb, 263 U. S. 225 72
Port Richmond Ferry Co. v. Board of Freeholders, 234 U. S. 317 326
Potts v. Hay, 229 Ark. 830 466
Power Reactor Co. v. Electricians, 367 U. S. 396 302
Preiser v. Rodriguez, 411 U. S. 475 527
Presnell v. Georgia, 439 U. S. 14 954
Price v. Gurney, 324 U. S. 100 478
Price v. Johnston, 334 U. S. 266 546, 589
Prince v. Massachusetts, 321 U. S. 158 414
Proctor v. Butler, 117 N. H. 927 431
Procunier v. Martinez, 416 U. S. 396 523, 531, 541, 547, 548, 551, 554, 571
Public Utilities Comm'n of Cal. v. United States, 355 U. S. 534 296
Public Utility Dist. No. 2 v. State, 82 Wash. 2d 232 152
Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18 442, 444, 449
Quarles, In re, 158 U. S. 532 662
Quern v. Mandley, 436 U. S. 725 603, 673
Quilloin v. Walcott, 434 U. S. 246 368, 385, 389, 393, 414, 415
Railroad Co. v. Maryland, 21 Wall. 456 449

Page

Railroad Trainmen v. Virginia ex rel. State Bar, 377 U. S. 1 466
Raley v. Ohio, 360 U. S. 423 133
Randall v. Goldmark, 495 F. 2d 356 670
Redington v. Touche Ross & Co., 592 F. 2d 617 741
Red Lion Broadcasting Co. v. FCC, 395 U. S. 367 185, 188, 300, 573
Reed v. People, 171 Colo. 421 376
Reed v. Reed, 404 U. S. 71 351, 354, 359, 366, 388, 391, 398, 747
Renegotiation Bd. v. Bannercraft Clothing Co., 415 U. S. 1 290
Renegotiation Bd. v. Grumman Aircraft Engineering Corp., 421 U. S. 168 290
Reporters Comm. for Freedom of Press v. American Tel. Co., 192 U. S. App. D. C. 376 191
Rewis v. United States, 401 U. S. 808 778
Reynolds v. Sims, 377 U. S. 533 416, 590, 737
Rhem v. Malcolm, 507 F. 2d 333 524, 531, 532
Rhem v. Malcolm, 527 F. 2d 1041 532
Rice v. Simmons, 2 Del. 309 165
Rice v. Wheeling Dollar Savings Co., 130 N. E. 2d 442 487
Richardson v. Miller, 446 F. 2d 1247 761
Richardson v. Ramirez, 418 U. S. 24 590
Riggle v. California, 577 F. 2d 579 741
Rinaldi v. Yeager, 384 U. S. 305 585
Robertson v. Wegmann, 436 U. S. 584 477, 479
Rochin v. California, 342 U. S. 165 578
Roe v. Wade, 410 U. S. 113 534, 569
Rolfe v. County Bd. of Ed., 282 F. Supp. 192 697

Page

Roman v. Sincock, 377 U. S. 695 416
Rosado v. Wyman, 397 U. S. 397 659, 661, 673, 674, 707, 739
Rosenblatt v. Baer, 383 U. S. 75 196, 200, 203
Rosenbloom v. Metromedia, Inc., 403 U. S. 29 200, 205
Roth v. United States, 354 U. S. 476 158
Roviaro v. United States, 353 U. S. 53 183, 196
Royster Drive-In Theatres, Inc. v. American Broadcasting-Paramount Theatres, Inc., 268 F. 2d 246 30
Runyon v. McCrary, 427 U. S. 160 641
S. v. Richard D., 410 U. S. 614 99
St. Amant v. Thompson, 390 U. S. 727 156, 157, 169, 187, 188, 200, 210
St. Louis v. Ferry Co., 11 Wall. 423 442
Sam Fox Publishing Co. v. United States, 366 U. S. 683 13
San Antonio Independent School Dist. v. Rodriguez, 411 U. S. 1 77, 398
Sandora v. Times Co., 113 Conn. 574 165
Sanks v. Georgia, 401 U. S. 144 550
Santa Clara Pueblo v. Martinez, 436 U. S. 49 691, 694, 698, 717, 741
Santa Fe Industries v. Green, 430 U. S. 462 478, 482, 736, 748
Sawyer, In re, 360 U. S. 622 89
Saxbe v. Washington Post Co., 417 U. S. 843 180, 189, 194
Scandinavian Airlines System v. Los Angeles, 56 Cal. 2d 11 438, 447
Schine Chain Theatres v. United States, 334 U. S. 110 735
Schlagenhauf v. Holder, 379 U. S. 104 177, 204–206
Schlesinger v. Ballard, 419 U. S. 498 354, 355, 398, 399, 410
Schlesinger v. Reservists to Stop the War, 418 U. S. 208 120, 744

Page
Schmerber v. California, 384 U. S. 757 559, 560
Schneckloth v. Bustamonte, 412 U. S. 218 375
Schneiderman v. United States, 320 U. S. 118 424, 432
Schreiner v. United States, 404 U. S. 67 469
Schware v. Board of Bar Examiners, 353 U. S. 232 89
Scott v. Illinois, 440 U. S. 367 137
Scott v. Times-Mirror Co., 181 Cal. 345 165
Screws v. United States, 325 U. S. 91 644, 661, 662
Sea-Land Service v. Alameda County, 12 Cal. 3d 772 438, 444
Sears, Roebuck & Co. v. Eckerd, 575 F. 2d 1197 290
SEC v. Capital Gains Research Bureau, 375 U. S. 180 482, 775
SEC v. National Securities, Inc., 393 U. S. 453 773, 774, 778
Securities Investor Protection Corp. v. Barbour, 421 U. S. 412 692, 698, 719, 738
Serna v. Portales Municipal Schools, 499 F. 2d 1147 706
Shadwick v. Tampa, 407 U. S. 345 255
Shannon v. HUD, 436 F. 2d 809 697, 726
Shannon v. HUD, 305 F. Supp. 205 114
Shapiro v. Thompson, 394 U. S. 618 532, 570
Sheldon v. Sill, 8 How. 441 747
Shelton v. Tucker, 364 U. S. 479 79, 465, 532, 574
Shirey v. State, 520 P. 2d 701 376
Sierra Club v. Morton, 405 U. S. 727 112
Silver v. New York Stock Exchange, 373 U. S. 341 19
Silverman v. United States, 365 U. S. 505 247, 260, 275–277
Simpkins v. Moses H. Cone Memorial Hospital, 323 F. 2d 959 711, 712, 723
Simon v. Eastern Kentucky Welfare Rights Org., 426 U. S. 26 99, 100, 120
Simpson v. Union Oil Co., 377 U. S. 13 34
Sinking-Fund Cases, 99 U. S. 700 744
Skoglund v. Singer Co., 403 F. Supp. 797 760
Smith v. Kansas City Title & Trust Co., 255 U. S. 180 734, 746
Smith v. Maryland, 18 How. 71 342
Smith v. Organization of Foster Families, 431 U. S. 816 397, 403, 414, 415
Smith v. United States, 431 U. S. 291 139
Snider v. All State Administrators, Inc., 414 U. S. 685 919
Snyder v. Tribune Co., 161 Iowa 671 166
Sola Electric Co. v. Jefferson Co., 317 U. S. 173 476, 477, 479, 735
Sosna v. Iowa, 419 U. S. 393 526
Southern Christian Leadership Conf. v. Connolly, 331 F. Supp. 940 696, 697, 726
Southern Pacific Co. v. Arizona ex rel. Sullivan, 325 U. S. 761 326, 454
Southern Pacific Co. v. Kentucky, 222 U. S. 63 442
Specht v. Patterson, 386 U. S. 605 425
Speiser v. Randall, 357 U. S. 513 425
Splawn v. California, 431 U. S. 595 139
Stack v. Boyle, 342 U. S. 1 534, 582, 583
Standard Oil Co. v. Peck, 342 U. S. 382 446, 447
Stanford v. Texas, 379 U. S. 476 255, 260
Stanley v. Georgia, 394 U. S. 557 573
Stanley v. Illinois, 405 U. S. 645 358, 385, 394, 396, 397, 403, 414, 535
Stanton v. Stanton, 421 U. S. 7 354, 359, 394, 398
Starkweather v. Blair, 245 Min. 371 587

Page

State. See also name of State.
State v. Alewine, 474 S. W. 2d 848 376
State v. Blackmon, 280 N. C. 42 372
State v. Craig, 237 So. 2d 737 376
State v. Davidson, 252 Ore. 617 376
State v. Hazelton, 330 A. 2d 919 376
State v. Nelson, 257 N. W. 2d 356 376
State v. Pineda, 110 Ariz. 342 375
State v. Siler, 292 N. C. 543 372
State v. Thacker, 281 N. C. 447 372
State v. Turner, 556 S. W. 2d 563 422, 428
State v. Wilson, 215 Kan. 28 376
State v. Young, 89 Wash. 2d 613 376
State ex rel. Berger v. Superior Court, 109 Ariz. 506 375
State ex rel. Hawks v. Lazaro, 157 W. Va. 417 432
Steele v. Louisville & N. R. Co., 323 U. S. 192 691, 693, 734
Steffel v. Thompson, 415 U. S. 452 708
Stockton v. Ford, 11 How. 232 89
Stone v. Powell, 428 U. S. 465 188, 784
Stromberg v. California, 283 U. S. 359 956
Stroud v. United States, 251 U. S. 15 558
Sugarman v. Dougall, 413 U. S. 634 73–76, 80, 81, 83, 84, 87
Sullins v. United States, 389 F. 2d 985 375
Sullivan v. Little Hunting Park, 396 U. S. 229 690–692, 698, 728, 736
Sullivan v. State, 351 So. 2d 659 375
Sumlin v. Brown, 420 F. Supp. 78 104
Sunal v. Large, 332 U. S. 174 784
Superintendent of Insurance v. Bankers Life & Cas. Co., 404 U. S. 6 692, 698, 707, 738, 773

Page

Superintendent of Worcester State Hospital v. Hagberg, 374 Mass. 271 431
Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U. S. 1 727
Swanson v. Traer, 354 U. S. 114 487
Sweezy v. New Hampshire, 354 U. S. 234 747
Swift v. Tyson, 16 Pet. 1 732
Swift & Co. v. Wickham, 382 U. S. 111 613, 614
Switchmen v. National Mediation Bd., 320 U. S. 297 735, 740
Takahashi v. Fish & Game Comm'n, 334 U. S. 410 73, 83, 334, 342
Tampa Electric Co. v. Nashville Coal Co., 365 U. S. 320 29, 30
Tannenbaum v. Zeller, 552 F. 2d 402 480–482, 484, 485
Tate v. Short, 401 U. S. 395 532
Tatum v. Myrick, 425 F. Supp. 809 103
Taussig v. Wellington Fund, Inc., 313 F. 2d 472 476
Taylor v. Kentucky, 436 U. S. 478 533, 582, 583, 786–789, 791
Teamsters v. Daniel, 439 U. S. 551 107
Teamsters v. Oliver, 358 U. S. 283 501
Teamsters v. United States, 431 U. S. 324 692, 758
TVA v. Hill, 437 U. S. 153 339, 745
TVA v. Powelson, 319 U. S. 266 512
Terrace v. Thompson, 263 U. S. 197 72
Terry, Ex parte, 128 U. S. 289 536
Terry v. Methodist Hospital, Civ. No. 76-373 (ND Ind.) 687
Terry v. Ohio, 392 U. S. 1 559
Texas & N. O. R. Co. v. Railway Clerks, 281 U. S. 548 691, 693, 733
Texas & Pacific R. Co. v. Rigsby, 241 U. S. 33 316, 689, 691, 706, 732, 733

Page

Textile Workers v. Lincoln Mills, 353 U. S. 448 477, 746
Thompson v. Globe Newspaper Co., 279 Mass. 176 166
Thornhill v. Alabama, 310 U. S. 88 187, 194
Time, Inc. v. Firestone, 424 U. S. 448 168, 169, 200
Time, Inc. v. Hill, 385 U. S. 374 161, 188, 192, 200
Time, Inc. v. Pape, 401 U. S. 279 200
T. I. M. E. Inc. v. United States, 359 U. S. 464 692, 707, 735
Times-Picayune Publishing Co. v. United States, 345 U. S. 594 30
Times Publishing Co. v. Ray, 1 S. W. 2d 471 167
Tippett v. Maryland, 436 F. 2d 1153 425, 429
Toll v. Moreno, 284 Md. 425 461
Toomer v. Witsell, 334 U. S. 385 327, 333, 341, 342, 345
TOPIC v. Circle Realty, 532 F. 2d 1273 96, 98, 99, 108
Townsend v. Swank, 404 U. S. 282 606, 673
Trafficante v. Metropolitan Life Ins. Co., 409 U. S. 205 96, 98, 100, 101, 105, 107, 109, 111–113, 118–123, 126, 128, 129
Trafficante v. Metropolitan Life Ins. Co., 322 F. Supp. 352 101
Transportation Union v. State Bar of Michigan, 401 U. S. 576 466
Trimble v. Gordon, 430 U. S. 762 352, 356, 357, 359, 360, 363, 364, 403, 405
Trop v. Dulles, 356 U. S. 86 75, 584, 587
Truax v. Raich, 239 U. S. 33 72, 73, 83
Tunstall v. Locomotive Firemen & Enginemen, 323 U. S. 210 477, 691, 693, 734–736
Turner, In re, 24 F. Cas. 337 651
Turner v. Bank of North America, 4 Dall. 8 612

Page

Twentieth Century Music Corp. v. Aiken, 422 U. S. 151 19
Udall v. Tallman, 380 U. S. 1 107
United Airlines v. McMann, 434 U. S. 192 758
United Copper Securities Co. v. Amalgamated Co., 244 U. S. 261 478, 487
United Handicapped Federation v. Andre, 558 F. 2d 413 742
United Shoe Machinery Corp. v. United States, 258 U. S. 451 28
United States v. Addyston Pipe & Steel Co., 85 F. 271 9
United States v. Agrusa, 541 F. 2d 690 241
United States v. Allegheny-Ludlum Steel Corp., 406 U. S. 742 313
United States v. American Oil Co., 456 F. 2d 1043 218
United States v. American Oil Co., 264 F. Supp. 93 225
United States v. American Railway Express Co., 265 U. S. 425 25
United States v. ASCAP, 341 F. 2d 1003 12
United States v. ASCAP, 208 F. Supp. 896 12, 28
United States v. Barnett, 376 U. S. 681 536
United States v. Birrell, 266 F. Supp. 539 774
United States v. Board of Ed. of Mineral County, 253 F. 2d 760 508, 517
United States v. Boston, 508 F. 2d 1171 375
United States v. Brignoni-Ponce, 422 U. S. 873 559
United States v. Brown, 555 F. 2d 336 775
United States v. Brown, 556 F. 2d 304 258
United States v. Campos-Serrano, 404 U. S. 293 779
United States v. Carolene Products Co., 304 U. S. 144 738
United States v. Caulton, 498 F. 2d 412 375

Page

United States v. Cavallino, 498 F. 2d 1200 375
United States v. Certain Land in Brooklyn, 346 F. 2d 690 517
United States v. Certain Property in Manhattan, 403 F. 2d 800 508, 515, 517, 518
United States v. Commodities Trading Corp., 339 U. S. 121 512
United States v. Cooper, 163 U. S. App. D. C. 55 375
United States v. Cors, 337 U. S. 325 511, 513
United States v. Cravero, 545 F. 2d 406 258, 260
United States v. Crisp, 435 F. 2d 354 375
United States v. Cruikshank, 92 U. S. 542 661
United States v. Culbert, 435 U. S. 371 774, 778, 779
United States v. Donovan, 429 U. S. 413 248, 266
United States v. Finazzo, 583 F. 2d 837 241, 267, 279, 280
United States v. Five Gambling Devices, 346 U. S. 441 265
United States v. Ford, 180 U. S. App. D. C. 1 241, 255
United States v. Ford, 414 F. Supp. 879 253, 254
United States v. Fuller, 409 U. S. 488 517
United States v. Ganter, 436 F. 2d 364 375
United States v. Gervato, 474 F. 2d 40 257, 258, 261
United States v. Gilliland, 312 U. S. 86 774
United States v. Grinnell Corp., 384 U. S. 563 22
United States v. Guest, 383 U. S. 745 649, 651, 661, 662
United States v. Guzman-Guzman, 488 F. 2d 965 375
United States v. Hall, 26 F. Cas. 79 651
United States v. Hayes, 385 F. 2d 375 375
United States v. Hilliker, 436 F. 2d 101 375

Page

United States v. Johnson, 319 U. S. 503 218
United States v. Kimbell Foods, Inc., 440 U. S. 715 477, 746, 901
United States v. Lilly, 576 F. 2d 1240 573, 576
United States v. Little Lake Misere Land Co., 412 U. S. 580 479
United States v. Loew's Inc., 371 U. S. 38 28
United States v. London, 424 F. Supp. 556 258
United States v. Lovasco, 431 U. S. 783 539
United States v. Lovett, 328 U. S. 303 538, 586
United States v. Marchildon, 519 F. 2d 337 375
United States v. Marion, 404 U. S. 307 534
United States v. Martinez-Fuerte, 428 U. S. 543 559
United States v. McKesson & Robbins, Inc., 351 U. S. 305 9
United States v. Mersky, 361 U. S. 431 295
United States v. Miller, 317 U. S. 369 510, 511, 513
United States v. Mitchell, 335 F. Supp. 1004 110
United States v. Montos, 421 F. 2d 215 375
United States v. Moreno-Lopez, 466 F. 2d 1205 375
United States v. Mosley, 238 U. S. 383 643, 651, 662, 663
United States v. National Assn. of Securities Dealers, 422 U. S. 694 478
United States v. New York Telephone Co., 434 U. S. 159 25, 264, 265, 279, 745
United States v. Nixon, 418 U. S. 683 173, 175, 182, 193, 196, 209, 210
United States v. Nourse, 6 Pet. 470 747
United States v. Paramount Pictures, 334 U. S. 131 28

Page

United States v. Park, 521 F. 2d 1381 559
United States v. Philadelphia National Bank, 374 U. S. 321 22
United States v. Price, 383 U. S. 787 644, 649, 651, 654, 661–663
United States v. Proctor & Gamble Co., 356 U. S. 677 217–219, 221–224, 232
United States v. Raines, 362 U. S. 17 132
United States v. Ramsey, 431 U. S. 606 265, 280, 559
United States v. Real Estate One, Inc., 433 F. Supp. 1140 115
United States v. Republic Steel Corp., 362 U. S. 482 691, 733
United States v. Reynolds, 345 U. S. 1 196
United States v. Reynolds, 397 U. S. 14 511
United States v. Rhodes, 27 F. Cas. 785 651
United States v. Richardson, 418 U. S. 166 738, 744
United States v. Rose, 215 F. 2d 617 219
United States v. Russell, 411 U. S. 423 539
United States v. Santora, 583 F. 2d 483 241, 249, 267
United States v. Scafidi, 564 F. 2d 633 241, 256
United States v. Sischo, 262 U. S. 165 627
United States v. Smith, 440 F. 2d 521 784
United States v. Socony-Vacuum Oil Co., 310 U. S. 150 9, 23, 220
United States v. Speaks, 453 F. 2d 966 375
United States v. Streets, Alleys & Public Ways, 531 F. 2d 882 515, 517
United States v. Stuckey, 441 F. 2d 1104 375
United States v. Thompson, 417 F. 2d 196 375

Page

United States v. Topco Associates, Inc., 405 U. S. 596 8, 9
United States v. Toronto Navigation Co., 338 U. S. 396 511–513, 515
United States v. Trenton Potteries Co., 273 U. S. 392 9, 23
United States v. U. S. District Court, 407 U. S. 297 249–251, 256, 262, 274
United States v. United States Gypsum Co., 438 U. S. 422 19
United States v. Virginia Electric & Power Co., 365 U. S. 624 511
United States v. Waddell, 112 U. S. 76 661, 662
United States v. Washington, 431 U. S. 181 375
United States v. Williams, 341 U. S. 70 662
United States v. Wilson, 421 U. S. 309 536
United States v. Wrightwood Dairy Co., 315 U. S. 110 150
United States v. W. T. Grant Co., 345 U. S. 629 543
United States v. Yazell, 382 U. S. 341 478
United States v. Zamarripa, 544 F. 2d 978 375
United States v. Zucca, 351 U. S. 91 302
United States ex rel. Manicone v. Corso, 365 F. Supp. 576 566
United States ex rel. Miller v. Twomey, 479 F. 2d 701 591
United States ex rel. TVA v. Powelson, 319 U. S. 266 512
U. S. Industries, Inc. v. U. S. District Court, 345 F. 2d 18 223
University of California Regents v. Bakke, 438 U. S. 265 719, 723, 724, 743, 747, 748
Uzzell v. Friday, 547 F. 2d 801 706
Valuation Proceedings, In re, 445 F. Supp. 994 513
Van Arsdale v. Time, Inc., 35 N. Y. S. 2d 951 167
Vance v. Bradley, 440 U. S. 93 351, 412, 543

Page
Van Lare v. Hurley, 421 U. S. 338 607, 673
Varnish v. Best Medium Publishing Co., 405 F. 2d 608 208
Varvaro v. American Agriculturist, Inc., 222 App. Div. 213 167
Vaughn v. Chrysler Corp., 382 F. Supp. 143 760
Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U. S. 519 302, 312, 313, 315, 316
Vest v. Lubbock County Comm'rs Court, 444 F. Supp. 824 566
Village. See name of village.
Virginia v. Paul, 148 U. S. 107 536
Virginian R. Co. v. Railway Employees, 300 U. S. 515 691, 693, 733, 734
Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U. S. 748 185
Vlandis v. Kline, 412 U. S. 441 459
Voutsis v. Union Carbide Corp., 452 F. 2d 889 756, 761
W., In re, 44 N. J. Super. 216 431
Wallis v. Pan American Petroleum Corp., 384 U. S. 63 479, 486
Warden v. Hayden, 387 U. S. 294 255
Warren Trading Post v. Arizona Tax Comm'n, 380 U. S. 685 441
Warth v. Seldin, 422 U. S. 490 99, 100, 109, 114, 120, 129, 218
Washington v. United States, 214 U. S. 33 508
Washington Post Co. v. Keogh, 125 U. S. App. D. C. 32 209
Washington Revenue Dept. v. Stevedoring Assn., 435 U. S. 734 444, 445, 447, 450, 452
Watson v. Commonwealth, 579 S. W. 2d 103 791
Webb v. O'Brien, 263 U. S. 313 72
Weber v. Aetna Casualty & Surety Co., 406 U. S. 164 352, 353, 359, 363, 364, 403

Page
Weichbrodt v. New York Evening Journal, 11 N. Y. S. 2d 112 167
Weinberger v. Wiesenfeld, 420 U. S. 636 364, 398
West v. Kansas Natural Gas Co., 221 U. S. 229 329, 340
Western Union Telegraph Co. v. Vickers, 71 Ga. App. 204 165
Westinghouse Electric Corp. v. NLRB, 369 F. 2d 891 502
Westinghouse Electric Corp. v. Schlesinger, 542 F. 2d 1190 289
Wheatley Heights Neighborhood Coalition v. Jenna Resales Co., 429 F. Supp. 486 108, 115
Wheeldin v. Wheeler, 373 U. S. 647 692, 735
White v. Dallas School Dist., 581 F. 2d 556 761
White v. Nicholls, 3 How. 266 163, 164
White Motor Co. v. United States, 372 U. S. 253 10, 20
Whitney v. California, 274 U. S. 357 183
Wickard v. Filburn, 317 U. S. 111 150
Williams v. Florida, 399 U. S. 78 132, 134–137
Williams v. Illinois, 399 U. S. 235 532
Williams v. North Carolina, 317 U. S. 287 955
Williams v. Rhodes, 393 U. S. 23 737
Williamson v. Lee Optical Co., 348 U. S. 483 589
Willson v. Black Bird Creek Marsh Co., 2 Pet. 245 326
Wilson, Ex parte, 114 U. S. 417 590
Wilson v. First Houston Investment Corp., 566 F. 2d 1235 476, 741
Winsey v. Pace College, 394 F. Supp. 1324 765
Winship, In re, 397 U. S. 358 423, 424, 427, 428, 533, 790
Wisconsin v. Yoder, 406 U. S. 205 77

Page

Witmark & Sons v. Jenson, 80 F. Supp. 843 11
WMCA, Inc. v. Lomenzo, 377 U. S. 633 416
Wolf v. Barkes, 348 F. 2d 994 484, 486
Wolff v. McDonnell, 418 U. S. 539 523, 545, 546, 590
Wong Wing v. United States, 163 U. S. 228 535, 536, 569, 590
Wong Yang Sung v. McGrath, 339 U. S. 33 313
Woodby v. INS, 385 U. S. 276 424, 428, 432
Woods v. Daggett, 541 F. 2d 237 551
Woodson v. North Carolina, 428 U. S. 280 584

Page

Wyandotte Transportation Co. v. United States, 389 U. S. 191 316, 691, 698, 703, 704, 707, 711, 733
Yick Wo v. Hopkins, 118 U. S. 356 72, 83
Young v. AAA Realty Co., 350 F. Supp. 1382 104, 108
Youngstown Sheet & Tube Co. v. Sawyer, 343 U. S. 579 306
Zeiss Stiftung v. V. E. B. Carl Zeiss, Jena, 40 F. R. D. 318 193
Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U. S. 100 9, 18, 28, 598
Zuch v. Hussey, 394 F. Supp. 1028 110
Zurcher v. Stanford Daily, 436 U. S. 547 258

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1978

BROADCAST MUSIC, INC., ET AL. *v.* COLUMBIA BROADCASTING SYSTEM, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 77-1578. Argued January 15, 1979—Decided April 17, 1979*

Respondent Columbia Broadcasting System, Inc. (CBS), brought this action against petitioners, American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI), and their members and affiliates, alleging, *inter alia*, that the issuance by ASCAP and BMI to CBS of blanket licenses to copyrighted musical compositions at fees negotiated by them is illegal price fixing under the antitrust laws. Blanket licenses give the licensees the right to perform any and all of the compositions owned by the members or affiliates as often as the licensees desire for a stated term. Fees for blanket licenses are ordinarily a percentage of total revenues or a flat dollar amount, and do not directly depend on the amount or type of music used. After a trial limited to the issue of liability, the District Court dismissed the complaint, holding, *inter alia*, that the blanket license was not price fixing and a *per se* violation of the Sherman Act. The Court of Appeals reversed and remanded for consideration of the appropriate remedy, holding that the blanket license issued to television networks was a form of price fixing illegal *per se* under the Sherman Act and established copyright misuse.

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*Together with No. 77-1583, *American Society of Composers, Authors and Publishers et al.* v. *Columbia Broadcasting System, Inc., et al.*, also on certiorari to the same court.

Held: The issuance by ASCAP and BMI of blanket licenses does not constitute price fixing *per se* unlawful under the antitrust laws. Pp. 7–25.

(a) "It is only after considerable experience with certain business relationships that courts classify them as *per se* violations of the Sherman Act." *United States* v. *Topco Associates, Inc.*, 405 U. S. 596, 607–608. And though there has been rather intensive antitrust scrutiny of ASCAP and BMI and their blanket licenses, that experience hardly counsels that this Court should outlaw the blanket license as a *per se* restraint of trade. Furthermore, the United States, by its *amicus* brief in the present case, urges that the blanket licenses, which consent decrees in earlier actions by the Government authorize ASCAP and BMI to issue to television networks, are not *per se* violations of the Sherman Act. And Congress, in the Copyright Act of 1976, has itself chosen to employ the blanket license and similar practices. Thus, there is no nearly universal view that the blanket licenses are a form of price fixing subject to automatic condemnation under the Sherman Act, rather than to a careful assessment under the rule of reason generally applied in Sherman Act cases. Pp. 7–16.

(b) In characterizing the conduct of issuing blanket licenses under the *per se* rule, this Court's inquiry must focus on whether the effect and, here because it tends to show effect, the purpose of the practice are to threaten the proper operation of a predominantly free-market economy. The blanket license is not a "naked restrain[t] of trade with no purpose except stifling of competition," *White Motor Co.* v. *United States*, 372 U. S. 253, 263, but rather accompanies the integration of sales, monitoring, and enforcement against unauthorized copyright use, which would be difficult and expensive problems if left to individual users and copyright owners. Although the blanket license fee is set by ASCAP and BMI rather than by competition among individual copyright owners, and although it is a fee for the use of any of the compositions covered by the license, the license cannot be wholly equated with a simple horizontal arrangement among competitors and is quite different from anything any individual owner could issue. In light of the background, which plainly indicates that over the years, and in the face of available alternatives including direct negotiation with individual copyright owners, the blanket license has provided an acceptable mechanism for at least a large part of the market for the performing rights to copyrighted musical compositions, it cannot automatically be declared illegal in all of its many manifestations. Rather, it should be subjected to a more discriminating examination under the rule of reason. Pp. 16–24.

1 Syllabus

(c) The Court of Appeals' judgment holding that the licensing practices of ASCAP and BMI are *per se* violations of the Sherman Act, and the copyright misuse judgment dependent thereon, are reversed, and the case is remanded for further proceedings to consider any unresolved issues that CBS may have properly brought to the Court of Appeals, including an assessment under the rule of reason of the blanket license as employed in the television industry. Pp. 24–25.

562 F. 2d 130, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. STEVENS, J., filed a dissenting opinion, *post*, p. 25.

Amalya L. Kearse argued the cause for petitioners in No. 77–1578. With her on the briefs were *George A. Davidson* and *Conley E. Brian, Jr.* *Jay Topkis* argued the cause for petitioners in No. 77–1583. With him on the briefs were *Bernard Korman, Simon H. Rifkind, Herman Finkelstein,* and *Allan Blumstein.*

Alan J. Hruska argued the cause for respondents in both cases. With him on the briefs were *John D. Appel* and *Robert M. Sondak.*

Deputy Solicitor General Easterbrook argued the cause for the United States as *amicus curiae* urging reversal. With him on the briefs were *Solicitor General McCree, Assistant Attorney General Shenefield, William Alsup, John J. Powers III,* and *Andrea Limmer.*†

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†Briefs of *amici curiae* urging reversal were filed by *Irwin Karp* for the Authors League of America, Inc.; by *Philip Elman* and *Robert M. Lichtman* for the Performing Right Society, Ltd., et al.; and by *Robert H. Bork* for Aaron Copland et al.

Briefs of *amici curiae* urging affirmance were filed by *Ira M. Millstein* for the All-Industry Television Music License Committee; by *Clarence Fried* for American Broadcasting Companies, Inc.; by *David R. Hyde* for National Broadcasting Company, Inc.; by *John H. Midlen, Jr.*, for National Religious Broadcasters, Inc.; and by *John L. Hill,* Attorney General of Texas, *David M. Kendall,* First Assistant Attorney General, and *Robert*

MR. JUSTICE WHITE delivered the opinion of the Court.

This case involves an action under the antitrust and copyright laws brought by respondent Columbia Broadcasting System, Inc. (CBS), against petitioners, American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI), and their members and affiliates.[1] The basic question presented is whether the issuance by ASCAP and BMI to CBS of blanket licenses to copyrighted musical compositions at fees negotiated by them is price fixing *per se* unlawful under the antitrust laws.

I

CBS operates one of three national commercial television networks, supplying programs to approximately 200 affiliated stations and telecasting approximately 7,500 network programs per year. Many, but not all, of these programs make use of copyrighted music recorded on the soundtrack. CBS also owns television and radio stations in various cities. It is "'the giant of the world in the use of music rights,'" the "'No. 1 outlet in the history of entertainment.'"[2]

Since 1897, the copyright laws have vested in the owner of a copyrighted musical composition the exclusive right to perform the work publicly for profit,[3] but the legal right is not self-enforcing. In 1914, Victor Herbert and a handful of other composers organized ASCAP because those who per-

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S. Bickerstaff and *Susan Dasher*, Assistant Attorneys General, for the Universities of the State of Texas et al.

Irving Moskovitz filed a brief for the All-Industry Radio Music License Committee as *amicus curiae*.

[1] The District Court certified the case as a defendant class action. 400 F. Supp. 737, 741 n. 2 (SDNY 1975).

[2] *Id.*, at 771, quoting a CBS witness. CBS is also a leading music publisher, with publishing subsidiaries affiliated with both ASCAP and BMI, and is the world's largest manufacturer and seller of records and tapes. *Ibid.*

[3] Act of Jan. 6, 1897, 29 Stat. 481.

formed copyrighted music for profit were so numerous and widespread, and most performances so fleeting, that as a practical matter it was impossible for the many individual copyright owners to negotiate with and license the users and to detect unauthorized uses. "ASCAP was organized as a 'clearing-house' for copyright owners and users to solve these problems" associated with the licensing of music. 400 F. Supp. 737, 741 (SDNY 1975). As ASCAP operates today, its 22,000 members grant it nonexclusive rights to license nondramatic performances of their works, and ASCAP issues licenses and distributes royalties to copyright owners in accordance with a schedule reflecting the nature and amount of the use of their music and other factors.

BMI, a nonprofit corporation owned by members of the broadcasting industry,[4] was organized in 1939, is affiliated with or represents some 10,000 publishing companies and 20,000 authors and composers, and operates in much the same manner as ASCAP. Almost every domestic copyrighted composition is in the repertory either of ASCAP, with a total of three million compositions, or of BMI, with one million.

Both organizations operate primarily through blanket licenses, which give the licensees the right to perform any and all of the compositions owned by the members or affiliates as often as the licensees desire for a stated term. Fees for blanket licenses are ordinarily a percentage of total revenues or a flat dollar amount, and do not directly depend on the amount or type of music used. Radio and television broadcasters are the largest users of music, and almost all of them hold blanket licenses from both ASCAP and BMI. Until this litigation, CBS held blanket licenses from both organizations for its television network on a continuous basis since the late 1940's and had never attempted to secure any other form of

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[4] CBS was a leader of the broadcasters who formed BMI, but it disposed of all of its interest in the corporation in 1959. 400 F. Supp., at 742.

license from either ASCAP [5] or any of its members. *Id.*, at 752–754.

The complaint filed by CBS charged various violations of the Sherman Act [6] and the copyright laws.[7] CBS argued that ASCAP and BMI are unlawful monopolies and that the blanket license is illegal price fixing, an unlawful tying arrangement, a concerted refusal to deal, and a misuse of copyrights. The District Court, though denying summary judgment to certain defendants, ruled that the practice did not fall within the *per se* rule. 337 F. Supp. 394, 398 (SDNY 1972). After an 8-week trial, limited to the issue of liability, the court dismissed the complaint, rejecting again the claim that the blanket license was price fixing and a *per se* violation of § 1 of the Sherman Act, and holding that since direct negotiation with individual copyright owners is available and feasible there is no undue restraint of trade, illegal tying, misuse of copyrights, or monopolization. 400 F. Supp., at 781–783.

Though agreeing with the District Court's factfinding and not disturbing its legal conclusions on the other antitrust theories of liability,[8] the Court of Appeals held that the blanket license issued to television networks was a form of price fixing illegal *per se* under the Sherman Act. 562 F. 2d 130, 140 (CA2 1977). This conclusion, without more, settled the issue of liability under the Sherman Act, established copyright misuse,[9] and required reversal of the District Court's

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[5] Unless the context indicates otherwise, references to ASCAP alone in this opinion usually apply to BMI as well. See n. 20, *infra*.

[6] 15 U. S. C. §§ 1 and 2.

[7] CBS seeks injunctive relief for the antitrust violations and a declaration of copyright misuse. 400 F. Supp., at 741.

[8] The Court of Appeals affirmed the District Court's rejection of CBS's monopolization and tying contentions but did not rule on the District Court's conclusion that the blanket license was not an unreasonable restraint of trade. See 562 F. 2d 130, 132, 135, 141 n. 29 (CA2 1977).

[9] At CBS's suggestion, the Court of Appeals held that the challenged conduct constituted misuse of copyrights solely on the basis of its finding of unlawful price fixing. *Id.*, at 141 n. 29.

judgment, as well as a remand to consider the appropriate remedy.[10]

ASCAP and BMI petitioned for certiorari, presenting the questions of the applicability of the *per se* rule and of whether this constitutes misuse of copyrights. CBS did not cross petition to challenge the failure to sustain its other antitrust claims. We granted certiorari because of the importance of the issues to the antitrust and copyright laws. 439 U. S. 817 (1978). Because we disagree with the Court of Appeals' conclusions with respect to the *per se* illegality of the blanket license, we reverse its judgment and remand the cause for further appropriate proceedings.

II

In construing and applying the Sherman Act's ban against contracts, conspiracies, and combinations in restraint of trade,

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[10] The Court of Appeals went on to suggest some guidelines as to remedy, indicating that despite its conclusion on liability the blanket license was not totally forbidden. The Court of Appeals said:

"Normally, after a finding of price-fixing, the remedy is an injunction against the price-fixing—in this case, the blanket license. We think, however, that if on remand a remedy can be fashioned which will ensure that the blanket license will not affect the price or negotiations for direct licenses, the blanket license need not be prohibited in all circumstances. The blanket license is not simply a 'naked restraint' ineluctably doomed to extinction. There is not enough evidence in the present record to compel a finding that the blanket license does not serve a market need for those who wish full protection against infringement suits or who, for some other business reason, deem the blanket license desirable. The blanket license includes a practical covenant not to sue for infringement of any ASCAP copyright as well as an indemnification against suits by others.

"Our objection to the blanket license is that it reduces price competition among the members and provides a disinclination to compete. We think that these objections may be removed if ASCAP itself is required to provide some form of per use licensing which will ensure competition among the individual members with respect to those networks which wish to engage in per use licensing." *Id.*, at 140 (footnotes omitted).

the Court has held that certain agreements or practices are so "plainly anticompetitive," *National Society of Professional Engineers* v. *United States*, 435 U. S. 679, 692 (1978); *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36, 50 (1977), and so often "lack . . . any redeeming virtue," *Northern Pac. R. Co.* v. *United States*, 356 U. S. 1, 5 (1958), that they are conclusively presumed illegal without further examination under the rule of reason generally applied in Sherman Act cases. This *per se* rule is a valid and useful tool of antitrust policy and enforcement.[11] And agreements among competitors to fix prices on their individual goods or services are among those concerted activities that the Court has held to be within the *per se* category.[12] But easy labels do not always supply ready answers.

A

To the Court of Appeals and CBS, the blanket license involves "price fixing" in the literal sense: the composers and publishing houses have joined together into an organization that sets its price for the blanket license it sells.[13] But this

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[11] "This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken." *Northern Pac. R. Co.* v. *United States*, 356 U. S. 1, 5 (1958).

See *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36, 50 n. 16 (1977); *United States* v. *Topco Associates, Inc.*, 405 U. S. 596, 609 n. 10 (1972).

[12] See cases discussed in n. 14, *infra*.

[13] CBS also complains that it pays a flat fee regardless of the amount of use it makes of ASCAP compositions and even though many of its programs contain little or no music. We are unable to see how that alone could make out an antitrust violation or misuse of copyrights:

"Sound business judgment could indicate that such payment represents the most convenient method of fixing the business value of the privileges

is not a question simply of determining whether two or more potential competitors have literally "fixed" a "price." As generally used in the antitrust field, "price fixing" is a shorthand way of describing certain categories of business behavior to which the *per se* rule has been held applicable. The Court of Appeals' literal approach does not alone establish that this particular practice is one of those types or that it is "plainly anticompetitive" and very likely without "redeeming virtue." Literalness is overly simplistic and often overbroad. When two partners set the price of their goods or services they are literally "price fixing," but they are not *per se* in violation of the Sherman Act. See *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271, 280 (CA6 1898), aff'd, 175 U. S. 211 (1899). Thus, it is necessary to characterize the challenged conduct as falling within or without that category of behavior to which we apply the label "*per se* price fixing." That will often, but not always, be a simple matter.[14]

Consequently, as we recognized in *United States* v. *Topco Associates, Inc.*, 405 U. S. 596, 607–608 (1972), "[i]t is only after considerable experience with certain business relationships that courts classify them as *per se* violations . . . ." See

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granted by the licensing agreement. . . . Petitioner cannot complain because it must pay royalties whether it uses Hazeltine patents or not. What it acquired by the agreement into which it entered was the privilege to use any or all of the patents and developments as it desired to use them." *Automatic Radio Mfg. Co.* v. *Hazeltine Research, Inc.*, 339 U. S. 827, 834 (1950).

See also *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U. S. 100 (1969).

[14] Cf., *e. g.*, *United States* v. *McKesson & Robbins, Inc.*, 351 U. S. 305 (1956) (manufacturer/wholesaler agreed with independent wholesalers on prices to be charged on products it manufactured); *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940) (firms controlling a substantial part of an industry agreed to purchase "surplus" gasoline with the intent and necessary effect of increasing the price); *United States* v. *Trenton Potteries Co.*, 273 U. S. 392 (1927) (manufacturers and distributors of 82% of certain vitreous pottery fixtures agreed to sell at uniform prices).

White Motor Co. v. *United States*, 372 U. S. 253, 263 (1963). We have never examined a practice like this one before; indeed, the Court of Appeals recognized that "[i]n dealing with performing rights in the music industry we confront conditions both in copyright law and in antitrust law which are *sui generis*." 562 F. 2d, at 132. And though there has been rather intensive antitrust scrutiny of ASCAP and its blanket licenses, that experience hardly counsels that we should outlaw the blanket license as a *per se* restraint of trade.

B

This litigation and other cases involving ASCAP and its licensing practices have arisen out of the efforts of the creators of copyrighted musical compositions to collect for the public performance of their works, as they are entitled to do under the Copyright Act. As already indicated, ASCAP and BMI originated to make possible and to facilitate dealings between copyright owners and those who desire to use their music. Both organizations plainly involve concerted action in a large and active line of commerce, and it is not surprising that, as the District Court found, "[n]either ASCAP nor BMI is a stranger to antitrust litigation." 400 F. Supp., at 743.

The Department of Justice first investigated allegations of anticompetitive conduct by ASCAP over 50 years ago.[15] A criminal complaint was filed in 1934, but the Government was granted a midtrial continuance and never returned to the courtroom. In separate complaints in 1941, the United States charged that the blanket license, which was then the only license offered by ASCAP and BMI, was an illegal restraint of trade and that arbitrary prices were being charged as the result of an illegal copyright pool.[16] The Government sought

[15] Cohn, Music, Radio Broadcasters and the Sherman Act, 29 Geo. L. J. 407, 424 n. 91 (1941).

[16] *E. g.*, complaint in *United States* v. *ASCAP*, Civ. No. 13-95 (SDNY 1941), pp. 3-4.

to enjoin ASCAP's exclusive licensing powers and to require a different form of licensing by that organization. The case was settled by a consent decree that imposed tight restrictions on ASCAP's operations.[17] Following complaints relating to the television industry, successful private litigation against ASCAP by movie theaters,[18] and a Government challenge to ASCAP's arrangements with similar foreign organizations, the 1941 decree was reopened and extensively amended in 1950.[19]

Under the amended decree, which still substantially controls the activities of ASCAP, members may grant ASCAP only nonexclusive rights to license their works for public performance. Members, therefore, retain the rights individually to license public performances, along with the rights to license the use of their compositions for other purposes. ASCAP itself is forbidden to grant any license to perform one or more specified compositions in the ASCAP repertory unless both the user and the owner have requested it in writing to do so. ASCAP is required to grant to any user making written application a nonexclusive license to perform all ASCAP compositions, either for a period of time or on a per-program basis. ASCAP may not insist on the blanket license, and the fee for the per-program license, which is to be based on the revenues for the program on which ASCAP music is played, must offer the applicant a genuine economic choice between the per-program license and the more common blanket license. If ASCAP and a putative licensee are unable to agree on a fee within 60 days, the applicant may apply to the District Court

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[17] *United States* v. *ASCAP*, 1940–1943 Trade Cases ¶ 56,104 (SDNY 1941).

[18] See *Alden-Rochelle, Inc.* v. *ASCAP*, 80 F. Supp. 888 (SDNY 1948); *M. Witmark & Sons* v. *Jenson*, 80 F. Supp. 843 (Minn. 1948), appeal dismissed *sub nom. M. Witmark & Sons* v. *Berger Amusement Co.*, 177 F. 2d 515 (CA8 1949).

[19] *United States* v. *ASCAP*, 1950–1951 Trade Cases ¶ 62,595 (SDNY 1950).

for a determination of a reasonable fee, with ASCAP having the burden of proving reasonableness.[20]

The 1950 decree, as amended from time to time, continues in effect, and the blanket license continues to be the primary instrument through which ASCAP conducts its business under the decree. The courts have twice construed the decree not to require ASCAP to issue licenses for selected portions of its repertory.[21] It also remains true that the decree guarantees the legal availability of direct licensing of performance rights by ASCAP members; and the District Court found, and in this respect the Court of Appeals agreed, that there are no practical impediments preventing direct dealing by the television networks if they so desire. Historically, they have not done so. Since 1946, CBS and other television networks have taken blanket licenses from ASCAP and BMI. It was not until this suit arose that the CBS network demanded any other kind of license.[22]

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[20] BMI is in a similar situation. The original decree against BMI is reported as *United States* v. *BMI*, 1940–1943 Trade Cases ¶ 56,096 (ED Wis. 1941). A new consent judgment was entered in 1966 following a monopolization complaint filed in 1964. *United States* v. *BMI*, 1966 Trade Cases ¶ 71,941 (SDNY). The ASCAP and BMI decrees do vary in some respects. The BMI decree does not specify that BMI may only obtain nonexclusive rights from its affiliates or that the District Court may set the fee if the parties are unable to agree. Nonetheless, the parties stipulated, and the courts below accepted, that "CBS could secure direct licenses from BMI affiliates with the same ease or difficulty, as the case may be, as from ASCAP members." 400 F. Supp., at 745.

[21] *United States* v. *ASCAP* (*Application of Shenandoah Valley Broadcasting, Inc.*), 208 F. Supp. 896 (SDNY 1962), aff'd, 331 F. 2d 117 (CA2), cert. denied, 377 U. S. 997 (1964); *United States* v. *ASCAP* (*Application of National Broadcasting Co.*), 1971 Trade Cases ¶ 73,491 (SDNY 1970). See also *United States* v. *ASCAP* (*Motion of Metromedia, Inc.*), 341 F. 2d 1003 (CA2 1965).

[22] National Broadcasting Co. did, in 1971, request an annual blanket license for 2,217 specific ASCAP compositions most frequently used on its variety shows. It intended to acquire the remaining rights to background and theme music through direct transactions by it and its program pack-

Of course, a consent judgment, even one entered at the behest of the Antitrust Division, does not immunize the defendant from liability for actions, including those contemplated by the decree, that violate the rights of nonparties. See *Sam Fox Publishing Co.* v. *United States*, 366 U. S. 683, 690 (1961), which involved this same decree. But it cannot be ignored that the Federal Executive and Judiciary have carefully scrutinized ASCAP and the challenged conduct, have imposed restrictions on various of ASCAP's practices, and, by the terms of the decree, stand ready to provide further consideration, supervision, and perhaps invalidation of asserted anticompetitive practices.[23] In these circumstances, we have a unique indicator that the challenged practice may have redeeming competitive virtues and that the search for those values is not almost sure to be in vain.[24] Thus, although CBS is not bound by the Antitrust Division's actions, the decree is a fact of economic and legal life in this industry, and the Court of Appeals should not have ignored it completely in analyzing the practice. See *id.*, at 694–695. That fact alone might not remove a naked price-fixing scheme from the ambit of the *per se* rule, but, as discussed *infra*, Part III, here we are uncertain whether the practice on its face has the effect, or could have been spurred by the purpose, of restraining competition among the individual composers.

After the consent decrees, the legality of the blanket license was challenged in suits brought by certain ASCAP members against individual radio stations for copyright infringement. The stations raised as a defense that the blanket license was a form of price fixing illegal under the Sherman Act. The par-

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agers. See *United States* v. *ASCAP (Application of National Broadcasting Co.)*, *supra*.

[23] 1950–1951 Trade Cases ¶ 62,595, p. 63,756.

[24] Cf. *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S., at 50 n. 16. Moreover, unthinking application of the *per se* rule might upset the balancing of economic power and of procompetitive and anticompetitive effects presumably worked out in the decree.

ties stipulated that it would be nearly impossible for each radio station to negotiate with each copyright holder separate licenses for the performance of his works on radio. Against this background, and relying heavily on the 1950 consent judgment, the Court of Appeals for the Ninth Circuit rejected claims that ASCAP was a combination in restraint of trade and that the blanket license constituted illegal price fixing. *K–91, Inc.* v. *Gershwin Publishing Corp.*, 372 F. 2d 1 (1967), cert. denied, 389 U. S. 1045 (1968).

The Department of Justice, with the principal responsibility for enforcing the Sherman Act and administering the consent decrees relevant to this case, agreed with the result reached by the Ninth Circuit. In a submission *amicus curiae* opposing one station's petition for certiorari in this Court, the Department stated that there must be "some kind of central licensing agency by which copyright holders may offer their works in a common pool to all who wish to use them." Memorandum for United States as *Amicus Curiae* on Pet. for Cert. in *K–91, Inc.* v. *Gershwin Publishing Corp.*, O. T. 1967, No. 147, pp. 10–11. And the Department elaborated on what it thought that fact meant for the proper application of the antitrust laws in this area:

> "The Sherman Act has always been discriminatingly applied in the light of economic realities. There are situations in which competitors have been permitted to form joint selling agencies or other pooled activities, subject to strict limitations under the antitrust laws to guarantee against abuse of the collective power thus created. *Associated Press* v. *United States*, 326 U. S. 1; *United States* v. *St. Louis Terminal*, 224 U. S. 383; *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344; *Chicago Board of Trade* v. *United States*, 246 U. S. 231. This case appears to us to involve such a situation. The extraordinary number of users spread across the land, the ease with which a performance may be broadcast, the sheer volume

> of copyrighted compositions, the enormous quantity of separate performances each year, the impracticability of negotiating individual licenses for each composition, and the ephemeral nature of each performance all combine to create unique market conditions for performance rights to recorded music." *Id.*, at 10 (footnote omitted).

The Department concluded that, in the circumstances of that case, the blanket licenses issued by ASCAP to individual radio stations were neither a *per se* violation of the Sherman Act nor an unreasonable restraint of trade.

As evidenced by its *amicus* brief in the present case, the Department remains of that view. Furthermore, the United States disagrees with the Court of Appeals in this case and urges that the blanket licenses, which the consent decree authorizes ASCAP to issue to television networks, are not *per se* violations of the Sherman Act. It takes no position, however, on whether the practice is an unreasonable restraint of trade in the context of the network television industry.

Finally, we note that Congress itself, in the new Copyright Act, has chosen to employ the blanket license and similar practices. Congress created a compulsory blanket license for secondary transmissions by cable television systems and provided that "[n]otwithstanding any provisions of the antitrust laws, . . . any claimants may agree among themselves as to the proportionate division of compulsory licensing fees among them, may lump their claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf." 17 U. S. C. App. § 111 (d)(5)(A). And the newly created compulsory license for the use of copyrighted compositions in jukeboxes is also a blanket license, which is payable to the performing-rights societies such as ASCAP unless an individual copyright holder can prove his entitlement to a share. § 116 (c)(4). Moreover, in requiring noncommercial broadcasters to pay for their use of copyrighted music, Congress again provided that "[n]otwithstand-

ing any provision of the antitrust laws" copyright owners "may designate common agents to negotiate, agree to, pay, or receive payments." § 118 (b). Though these provisions are not directly controlling, they do reflect an opinion that the blanket license, and ASCAP, are economically beneficial in at least some circumstances.

There have been District Court cases holding various ASCAP practices, including its licensing practices, to be violative of the Sherman Act,[25] but even so, there is no nearly universal view that either the blanket or the per-program licenses issued by ASCAP at prices negotiated by it are a form of price fixing subject to automatic condemnation under the Sherman Act, rather than to a careful assessment under the rule of reason.

III

Of course, we are no more bound than is CBS by the views of the Department of Justice, the results in the prior lower court cases, or the opinions of various experts about the merits of the blanket license. But while we must independently examine this practice, all those factors should caution us against too easily finding blanket licensing subject to *per se* invalidation.

A

As a preliminary matter, we are mindful that the Court of Appeals' holding would appear to be quite difficult to contain. If, as the court held, there is a *per se* antitrust violation whenever ASCAP issues a blanket license to a television network for a single fee, why would it not also be automatically illegal for ASCAP to negotiate and issue blanket licenses to

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[25] See cases cited n. 18, *supra*. Those cases involved licenses sold to individual movie theaters to "perform" compositions already on the motion pictures' soundtracks. ASCAP had barred its members from assigning performing rights to movie producers at the same time recording rights were licensed, and the theaters were effectively unable to engage in direct transactions for performing rights with individual copyright owners.

individual radio or television stations or to other users who perform copyrighted music for profit?[26] Likewise, if the present network licenses issued through ASCAP on behalf of its members are *per se* violations, why would it not be equally illegal for the members to authorize ASCAP to issue licenses establishing various categories of uses that a network might have for copyrighted music and setting a standard fee for each described use?

Although the Court of Appeals apparently thought the blanket license could be saved in some or even many applications, it seems to us that the *per se* rule does not accommodate itself to such flexibility and that the observations of the Court of Appeals with respect to remedy tend to impeach the *per se* basis for the holding of liability.[27]

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[26] Certain individual television and radio stations, appearing here as *amici curiae*, argue that the *per se* rule should extend to ASCAP's blanket licenses with them as well. The television stations have filed an antitrust suit to that effect. *Buffalo Broadcasting Co.* v. *ASCAP*, 78 Civ. 5670 (SDNY, filed Nov. 27, 1978).

[27] See n. 10, *supra*. The Court of Appeals would apparently not outlaw the blanket license across the board but would permit it in various circumstances where it is deemed necessary or sufficiently desirable. It did not even enjoin blanket licensing with the television networks, the relief it realized would normally follow a finding of *per se* illegality of the license in that context. Instead, as requested by CBS, it remanded to the District Court to require ASCAP to offer in addition to blanket licensing some competitive form of per-use licensing. But per-use licensing by ASCAP, as recognized in the consent decrees, might be even more susceptible to the *per se* rule than blanket licensing.

The rationale for this unusual relief in a *per se* case was that "[t]he blanket license is not simply a 'naked restraint' ineluctably doomed to extinction." 562 F. 2d, at 140. To the contrary, the Court of Appeals found that the blanket license might well "serve a market need" for some. *Ibid.* This, it seems to us, is not the *per se* approach, which does not yield so readily to circumstances, but in effect is a rather bobtailed application of the rule of reason, bobtailed in the sense that it is unaccompanied by the necessary analysis demonstrating why the particular licensing system is an undue competitive restraint.

CBS would prefer that ASCAP be authorized, indeed directed, to make all its compositions available at standard per-use rates within negotiated categories of use. 400 F. Supp., at 747 n. 7.[28] But if this in itself or in conjunction with blanket licensing constitutes illegal price fixing by copyright owners, CBS urges that an injunction issue forbidding ASCAP to issue any blanket license or to negotiate any fee except on behalf of an individual member for the use of his own copyrighted work or works.[29] Thus, we are called upon to determine that blanket licensing is unlawful across the board. We are quite sure, however, that the *per se* rule does not require any such holding.

B

In the first place, the line of commerce allegedly being restrained, the performing rights to copyrighted music, exists at all only because of the copyright laws. Those who would use copyrighted music in public performances must secure consent from the copyright owner or be liable at least for the statutory damages for each infringement and, if the conduct is willful and for the purpose of financial gain, to criminal penalties.[30] Furthermore, nothing in the Copyright Act of 1976 indicates in the slightest that Congress intended to weaken the rights of copyright owners to control the public

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[28] Surely, if ASCAP abandoned the issuance of all licenses and confined its activities to policing the market and suing infringers, it could hardly be said that member copyright owners would be in violation of the antitrust laws by not having a common agent issue per-use licenses. Under the copyright laws, those who publicly perform copyrighted music have the burden of obtaining prior consent. Cf. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U. S., at 139–140.

[29] In its complaint, CBS alleged that it would be "wholly impracticable" for it to obtain individual licenses directly from the composers and publishing houses, but it now says that it would be willing to do exactly that if ASCAP were enjoined from granting blanket licenses to CBS or its competitors in the network television business.

[30] 17 U. S. C. App. § 506.

performance of musical compositions. Quite the contrary is true.[31] Although the copyright laws confer no rights on copyright owners to fix prices among themselves or otherwise to violate the antitrust laws, we would not expect that any market arrangements reasonably necessary to effectuate the rights that are granted would be deemed a *per se* violation of the Sherman Act. Otherwise, the commerce anticipated by the Copyright Act and protected against restraint by the Sherman Act would not exist at all or would exist only as a pale reminder of what Congress envisioned.[32]

C

More generally, in characterizing this conduct under the *per se* rule,[33] our inquiry must focus on whether the effect and, here because it tends to show effect, see *United States* v. *United States Gypsum Co.*, 438 U. S. 422, 436 n. 13 (1978), the purpose of the practice are to threaten the proper operation of our predominantly free-market economy—that is, whether the practice facially appears to be one that would always or

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[31] See Koenigsberg, The 1976 Copyright Act: Advances for the Creator, 26 Cleve. St L. Rev. 515, 524, 528 (1977).

[32] Cf. *Silver* v. *New York Stock Exchange*, 373 U. S. 341 (1963). Because a musical composition can be "consumed" by many different people at the same time and without the creator's knowledge, the "owner" has no real way to demand reimbursement for the use of his property except through the copyright laws *and* an effective way to enforce those legal rights. See *Twentieth Century Music Corp.* v. *Aiken*, 422 U. S. 151, 162 (1975). It takes an organization of rather large size to monitor most or all uses and to deal with users on behalf of the composers. Moreover, it is inefficient to have too many such organizations duplicating each other's monitoring of use.

[33] The scrutiny occasionally required must not merely subsume the burdensome analysis required under the rule of reason, see *National Society of Professional Engineers* v. *United States*, 435 U. S. 679, 690–692 (1978), or else we should apply the rule of reason from the start. That is why the *per se* rule is not employed until after considerable experience with the type of challenged restraint.

almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to "increase economic efficiency and render markets more, rather than less, competitive." *Id.*, at 441 n. 16; see *National Society of Professional Engineers* v. *United States*, 435 U. S., at 688; *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S., at 50 n. 16; *Northern Pac. R. Co.* v. *United States*, 356 U. S., at 4.

The blanket license, as we see it, is not a "naked restrain[t] of trade with no purpose except stifling of competition," *White Motor Co.* v. *United States*, 372 U. S. 253, 263 (1963), but rather accompanies the integration of sales, monitoring, and enforcement against unauthorized copyright use. See L. Sullivan, Handbook of the Law of Antitrust § 59, p. 154 (1977). As we have already indicated, ASCAP and the blanket license developed together out of the practical situation in the marketplace: thousands of users, thousands of copyright owners, and millions of compositions. Most users want unplanned, rapid, and indemnified access to any and all of the repertory of compositions, and the owners want a reliable method of collecting for the use of their copyrights. Individual sales transactions in this industry are quite expensive, as would be individual monitoring and enforcement, especially in light of the resources of single composers. Indeed, as both the Court of Appeals and CBS recognize, the costs are prohibitive for licenses with individual radio stations, nightclubs, and restaurants, 562 F. 2d, at 140 n. 26, and it was in that milieu that the blanket license arose.

A middleman with a blanket license was an obvious necessity if the thousands of individual negotiations, a virtual impossibility, were to be avoided. Also, individual fees for the use of individual compositions would presuppose an intricate schedule of fees and uses, as well as a difficult and expensive reporting problem for the user and policing task for the copyright owner. Historically, the market for public-performance rights organized itself largely around the single-fee blanket

license, which gave unlimited access to the repertory and reliable protection against infringement. When ASCAP's major and user-created competitor, BMI, came on the scene, it also turned to the blanket license.

With the advent of radio and television networks, market conditions changed, and the necessity for and advantages of a blanket license for those users may be far less obvious than is the case when the potential users are individual television or radio stations, or the thousands of other individuals and organizations performing copyrighted compositions in public.[34] But even for television network licenses, ASCAP reduces costs absolutely by creating a blanket license that is sold only a few, instead of thousands,[35] of times, and that obviates the need for closely monitoring the networks to see that they do not use more than they pay for.[36] ASCAP also provides the necessary resources for blanket sales and enforcement, resources unavailable to the vast majority of composers and publishing houses. Moreover, a bulk license of some type is a necessary consequence of the integration necessary to achieve these efficiencies, and a necessary consequence of an aggregate license is that its price must be established.

D

This substantial lowering of costs, which is of course potentially beneficial to both sellers and buyers, differentiates the blanket license from individual use licenses. The blanket license is composed of the individual compositions plus the aggregating service. Here, the whole is truly greater than the

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[34] And of course changes brought about by new technology or new marketing techniques might also undercut the justification for the practice.

[35] The District Court found that CBS would require between 4,000 and 8,000 individual license transactions per year. 400 F. Supp., at 762.

[36] To operate its system for distributing the license revenues to its members, ASCAP relies primarily on the networks' records of which compositions are used.

sum of its parts; it is, to some extent, a different product. The blanket license has certain unique characteristics: It allows the licensee immediate use of covered compositions, without the delay of prior individual negotiations,[37] and great flexibility in the choice of musical material. Many consumers clearly prefer the characteristics and cost advantages of this marketable package,[38] and even small performing-rights societies that have occasionally arisen to compete with ASCAP and BMI have offered blanket licenses.[39] Thus, to the extent the blanket license is a different product, ASCAP is not really a joint sales agency offering the individual goods of many sellers, but is a separate seller offering its blanket license, of which the individual compositions are raw material.[40] ASCAP,

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[37] See Timberg, The Antitrust Aspects of Merchandising Modern Music: The ASCAP Consent Judgment of 1950, 19 Law & Contemp. Prob. 294, 297 (1954) ("The disk-jockey's itchy fingers and the bandleader's restive baton, it is said, cannot wait for contracts to be drawn with ASCAP's individual publisher members, much less for the formal acquiescence of a characteristically unavailable composer or author"). Significantly, ASCAP deals only with nondramatic performance rights. Because of their nature, dramatic rights, such as for musicals, can be negotiated individually and well in advance of the time of performance. The same is true of various other rights, such as sheet music, recording, and synchronization, which are licensed on an individual basis.

[38] Cf. *United States* v. *Grinnell Corp.*, 384 U. S. 563, 572–573 (1966); *United States* v. *Philadelphia Nat. Bank*, 374 U. S. 321, 356–357 (1963).

[39] Comment, Music Copyright Associations and the Antitrust Laws, 25 Ind. L. J. 168, 170 (1950). See also Garner, *United States* v. *ASCAP:* The Licensing Provisions of the Amended Final Judgment of 1950, 23 Bull. Copyright Soc. 119, 149 (1975) ("no performing rights are licensed on other than a blanket basis in any nation in the world").

[40] Moreover, because of the nature of the product—a composition can be simultaneously "consumed" by many users—composers have numerous markets and numerous incentives to produce, so the blanket license is unlikely to cause decreased output, one of the normal undesirable effects of a cartel. And since popular songs get an increased share of ASCAP's revenue distributions, composers compete even within the blanket license in terms of productivity and consumer satisfaction.

in short, made a market in which individual composers are inherently unable to compete fully effectively.[41]

E

Finally, we have some doubt—enough to counsel against application of the *per se* rule—about the extent to which this practice threatens the "central nervous system of the economy," *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 226 n. 59 (1940), that is, competitive pricing as the free market's means of allocating resources. Not all arrangements among actual or potential competitors that have an impact on price are *per se* violations of the Sherman Act or even unreasonable restraints. Mergers among competitors eliminate competition, including price competition, but they are not *per se* illegal, and many of them withstand attack under any existing antitrust standard. Joint ventures and other cooperative arrangements are also not usually unlawful, at least not as price-fixing schemes, where the agreement on price is necessary to market the product at all.

Here, the blanket-license fee is not set by competition among individual copyright owners, and it is a fee for the use of any of the compositions covered by the license. But the blanket license cannot be wholly equated with a simple horizontal arrangement among competitors. ASCAP does set the price for its blanket license, but that license is quite different from anything any individual owner could issue. The individual composers and authors have neither agreed not to sell individually in any other market nor use the blanket

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[41] Cf. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S., at 217 (distinguishing *Chicago Bd. of Trade* v. *United States*, 246 U. S. 231 (1918), on the ground that among the effects of the challenged rule there "was the creation of a public market"); *United States* v. *Trenton Potteries Co.*, 273 U. S., at 401 (distinguishing *Chicago Bd. of Trade* on the ground that it did not involve "a price agreement among competitors in an open market").

license to mask price fixing in such other markets.[42] Moreover, the substantial restraints placed on ASCAP and its members by the consent decree must not be ignored. The District Court found that there was no legal, practical, or conspiratorial impediment to CBS's obtaining individual licenses; CBS, in short, had a real choice.

With this background in mind, which plainly enough indicates that over the years, and in the face of available alternatives, the blanket license has provided an acceptable mechanism for at least a large part of the market for the performing rights to copyrighted musical compositions, we cannot agree that it should automatically be declared illegal in all of its many manifestations. Rather, when attacked, it should be subjected to a more discriminating examination under the rule of reason. It may not ultimately survive that attack, but that is not the issue before us today.

IV

As we have noted, n. 27, *supra,* the enigmatic remarks of the Court of Appeals with respect to remedy appear to have departed from the court's strict, *per se* approach and to have invited a more careful analysis. But this left the general import of its judgment that the licensing practices of ASCAP and BMI under the consent decree are *per se* violations of the Sherman Act. We reverse that judgment, and the copyright misuse judgment dependent upon it, see n. 9, *supra,* and remand for further proceedings to consider any unresolved issues that CBS may have properly brought to the Court of Appeals.[43] Of course, this will include an assessment under

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[42] "CBS does not claim that the individual members and affiliates ('sellers') of ASCAP and BMI have agreed among themselves as to the prices to be charged for the particular 'products' (compositions) offered by each of them." 400 F. Supp., at 748.

[43] It is argued that the judgment of the Court of Appeals should nevertheless be affirmed on the ground that the blanket license is a tying

the rule of reason of the blanket license as employed in the television industry, if that issue was preserved by CBS in the Court of Appeals.[44]

The judgment of the Court of Appeals is reversed, and the cases are remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE STEVENS, dissenting.

The Court holds that ASCAP's blanket license is not a species of price fixing categorically forbidden by the Sherman Act. I agree with that holding. The Court remands the cases to the Court of Appeals, leaving open the question whether the blanket license as employed by ASCAP and BMI is unlawful under a rule-of-reason inquiry. I think that question is properly before us now and should be answered affirmatively.

There is ample precedent for affirmance of the judgment of the Court of Appeals on a ground that differs from its rationale, provided of course that we do not modify its judgment.[1] In this litigation, the judgment of the Court of Appeals was

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arrangement in violation of § 1 of the Sherman Act or on the ground that ASCAP and BMI have monopolized the relevant market contrary to § 2. The District Court and the Court of Appeals rejected both submissions, and we do not disturb the latter's judgment in these respects, particularly since CBS did not file its own petition for certiorari challenging the Court of Appeals' failure to sustain its tying and monopolization claims.

[44] The Court of Appeals did not address the rule-of-reason issue, and BMI insists that CBS did not preserve the question in that court. In any event, if the issue is open in the Court of Appeals, we prefer that that court first address the matter. Because of the United States' interest in the enforcement of the consent decree, we assume it will continue to play a role in this litigation on remand.

[1] See *United States* v. *New York Telephone Co.*, 434 U. S. 159, 166 n. 8; *Dayton Board of Education* v. *Brinkman*, 433 U. S. 406, 419; *Massachusetts Mutual Life Ins. Co.* v. *Ludwig*, 426 U. S. 479, 480–481; *United States* v. *American Railway Express Co.*, 265 U. S. 425, 435.

not that blanket licenses may never be offered by ASCAP and BMI. Rather, its judgment directed the District Court to fashion relief requiring them to offer additional forms of license as well.[2] Even though that judgment may not be consistent with its stated conclusion that the blanket license is "illegal *per se*" as a kind of price fixing, it is entirely consistent with a conclusion that petitioners' exclusive all-or-nothing blanket-license policy violates the rule of reason.[3]

The Court of Appeals may well so decide on remand. In my judgment, however, a remand is not necessary.[4] The record before this Court is a full one, reflecting extensive discovery and eight weeks of trial. The District Court's findings of fact are thorough and well supported. They clearly reveal that the challenged policy does have a significant adverse impact on competition. I would therefore affirm the judgment of the Court of Appeals.

I

In December 1969, the president of the CBS television network wrote to ASCAP and BMI requesting that each "promptly . . . grant a new performance rights license which

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[2] 562 F. 2d 130, 140–141 (CA2 1977).

[3] See *ante*, at 17 n. 27 (describing relief ordered by Court of Appeals as "unusual" for a *per se* case, and suggesting that that court's decision appears more consistent with a rule-of-reason approach).

[4] That the rule-of-reason issues have been raised and preserved throughout seems to me clear. See 562 F. 2d, at 134. ("CBS contends that the blanket licensing method is not only an illegal tie-in or blockbooking which in practical terms is coercive in effect, but is also an illegal price-fixing device, a per se violation . . . "); *id.*, at 141 n. 29 ("As noted, CBS also claims violation of § 2 of the Sherman Act. We need not go into the legal arguments on this point because they are grounded on its factual claim that there are barriers to direct licensing and 'bypass' of the ASCAP blanket license. The District Court, as noted, rejected this contention and its findings are not clearly erroneous. The § 2 claim must therefore fail at this time and on this record"); Brief for Respondents 41.

will provide, effective January 1, 1970, for payments measured by the actual use of your music." [5] ASCAP and BMI each responded by stating that it considered CBS's request to be an application for a license in accordance with the provisions of its consent decree and would treat it as such,[6] even though neither decree provides for licensing on a per-composition or per-use basis.[7] Rather than pursuing further discussion, CBS instituted this suit.

Whether or not the CBS letter is considered a proper demand for per-use licensing is relevant, if at all, only on the question of relief. For the fact is, and it cannot seriously be questioned, that ASCAP and BMI have steadfastly adhered to the policy of only offering overall blanket or per-program licenses,[8] notwithstanding requests for more limited authorizations. Thus, ASCAP rejected a 1971 request by NBC for licenses for 2,217 specific compositions,[9] as well as an earlier request by a group of television stations for more limited authority than the blanket licenses which they were then

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[5] 400 F. Supp. 737, 753 (SDNY 1975).

[6] ASCAP responded in a letter from its general counsel, stating that it would consider the request at its next board of directors meeting, and that it regarded it as an application for a license consistent with the decree. The letter from BMI's president stated: "The BMI Consent Decree provides for several alternative licenses and we are ready to explore any of these with you." *Id.*, at 753–754.

[7] See *ante*, at 12, and n. 21.

[8] The 1941 decree requires ASCAP to offer per-program licenses as an alternative to the blanket license. *United States* v. *ASCAP*, 1940–1943 Trade Cases ¶ 56,104, p. 404 (SDNY). Analytically, however, there is little difference between the two. A per-program license also covers the entire ASCAP repertoire; it is therefore simply a miniblanket license. As is true of a long-term blanket license, the fees set are in no way dependent on the quantity or quality of the music used. See *infra*, at 30–33.

[9] See *United States* v. *ASCAP (Application of National Broadcasting Co.)*, 1971 Trade Cases ¶ 73,491 (SDNY 1970).

purchasing.[10] Neither ASCAP nor BMI has ever offered to license anything less than its entire portfolio, even on an experimental basis. Moreover, if the response to the CBS letter were not sufficient to characterize their consistent policy, the defense of this lawsuit surely is. It is the refusal to license anything less than the entire repertoire—rather than the decision to offer blanket licenses themselves—that raises the serious antitrust questions in this case.

II

Under our prior cases, there would be no question about the illegality of the blanket-only licensing policy if ASCAP and BMI were the exclusive sources of all licenses. A copyright, like a patent, is a statutory grant of monopoly privileges. The rules which prohibit a patentee from enlarging his statutory monopoly by conditioning a license on the purchase of unpatented goods,[11] or by refusing to grant a license under one patent unless the licensee also takes a license under another, are equally applicable to copyrights.[12]

It is clear, however, that the mere fact that the holder of several patents has granted a single package license covering them all does not establish any illegality. This point was settled by *Automatic Radio Mfg. Co.* v. *Hazeltine Research, Inc.*, 339 U. S. 827, 834, and reconfirmed in *Zenith Radio Corp.*

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[10] See *United States* v. *ASCAP (Application of Shenandoah Valley Broadcasting, Inc.)*, 208 F. Supp. 896 (SDNY 1962), aff'd, 331 F. 2d 117 (CA2 1964), cert. denied, 377 U. S. 997.

[11] *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U. S. 661; *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436; *International Business Machines Corp.* v. *United States*, 298 U. S. 131; *United Shoe Machinery Corp.* v. *United States*, 258 U. S. 451.

[12] Indeed, the leading cases condemning the practice of "blockbooking" involved copyrighted motion pictures, rather than patents. See *United States* v. *Paramount Pictures*, 334 U. S. 131; *United States* v. *Loew's Inc.*, 371 U. S. 38.

v. *Hazeltine Research, Inc.*, 395 U. S. 100, 137–138. The Court is therefore unquestionably correct in its conclusion that ASCAP's issuance of blanket licenses covering its entire inventory is not, standing alone, automatically unlawful. But both of those cases identify an important limitation on this rule. In the former, the Court was careful to point out that the record did not present the question whether the package license would have been unlawful if Hazeltine had refused to license on any other basis. 339 U. S., at 831. And in the latter case, the Court held that the package license was illegal because of such a refusal. 395 U. S., at 140–141.

Since ASCAP offers only blanket licenses, its licensing practices fall on the illegal side of the line drawn by the two *Hazeltine* cases. But there is a significant distinction: unlike Hazeltine, ASCAP does not have exclusive control of the copyrights in its portfolio, and it is perfectly possible—at least as a legal matter—for a user of music to negotiate directly with composers and publishers for whatever rights he may desire. The availability of a practical alternative alters the competitive effect of a blockbooking or blanket-licensing policy. ASCAP is therefore quite correct in its insistence that its blanket license cannot be categorically condemned on the authority of the blockbooking and package-licensing cases. While these cases are instructive, they do not directly answer the question whether the ASCAP practice is unlawful.

The answer to that question depends on an evaluation of the effect of the practice on competition in the relevant market. And, of course, it is well settled that a sales practice that is permissible for a small vendor, at least when no coercion is present, may be unreasonable when employed by a company that dominates the market.[13] We therefore must consider

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[13] See *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U. S. 320, 334 (upholding requirements contract on the ground that "[t]here is here neither a seller with a dominant position in the market as in *Standard*

what the record tells us about the competitive character of this market.

III

The market for music at issue here is wholly dominated by ASCAP-issued blanket licenses.[14] Virtually every domestic copyrighted composition is in the repertoire of either ASCAP or BMI. And again, virtually without exception, the only means that has been used to secure authority to perform such compositions is the blanket license.

The blanket all-or-nothing license is patently discriminatory.[15] The user purchases full access to ASCAP's entire

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Fashion [*Co.* v. *Magrane-Houston Co.*, 258 U. S. 346]; nor myriad outlets with substantial sales volume, coupled with an industry-wide practice of relying upon exclusive contracts, as in *Standard Oil* [*Co.* v. *United States*, 337 U. S. 293]; nor a plainly restrictive tying arrangement as in *International Salt* [*Co.* v. *United States*, 332 U. S. 392]"); *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594, 610–612 (upholding challenged advertising practice because, while the volume of commerce affected was not "'insignificant or insubstantial,'" seller was found not to occupy a "dominant position" in the relevant market). While our cases make clear that a violation of the Sherman Act requires both that the volume of commerce affected be substantial and that the seller enjoy a dominant position, see *id.*, at 608–609, proof of actual compulsion has not been required, but cf. *Royster Drive-In Theatres, Inc.* v. *American Broadcasting-Paramount Theatres, Inc.*, 268 F. 2d 246, 251 (CA2 1959), cert. denied, 361 U. S. 885; *Milwaukee Towne Corp.* v. *Loew's, Inc.*, 190 F. 2d 561 (CA7 1951), cert. denied, 342 U. S. 909. The critical question is one of the likely practical effect of the arrangement: whether the "court believes it probable that performance of the contract will foreclose competition in a substantial share of the line of commerce affected." *Tampa Electric Co.* v. *Nashville Coal Co.*, *supra*, at 327.

[14] As in the majority opinion, my references to ASCAP generally encompass BMI as well.

[15] See Cirace, *CBS* v. *ASCAP:* An Economic Analysis of A Political Problem, 47 Ford. L. Rev. 277, 286 (1978) ("the all-or-nothing bargain allows the monopolist to reap the benefits of perfect price discrimination without confronting the problems posed by dealing with different buyers on different terms").

repertoire, even though his needs could be satisfied by a far more limited selection. The price he pays for this access is unrelated either to the quantity or the quality of the music he actually uses, or, indeed, to what he would probably use in a competitive system. Rather, in this unique all-or-nothing system, the price is based on a percentage of the user's advertising revenues,[16] a measure that reflects the customer's ability to pay [17] but is totally unrelated to factors—such as the cost, quality, or quantity of the product—that normally affect price in a competitive market. The ASCAP system requires users to buy more music than they want at a price which, while not beyond their ability to pay and perhaps not even beyond what is "reasonable" for the access they are getting,[18] may well be far higher than what they would choose to spend for music in

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[16] For many years prior to the commencement of this action, the BMI blanket-license fee amounted to 1.09% of net receipts from sponsors after certain specified deductions. 400 F. Supp., at 743. The fee for access to ASCAP's larger repertoire was set at 2.5% of net receipts; in recent years, however, CBS has paid a flat negotiated fee, rather than a percentage, to ASCAP. 23 Jt. App. in CA2 No. 75-7600, pp. E1051–E1052, E1135.

[17] See Cirace, *supra*, at 288:

"This history indicates that, from its inception, ASCAP exhibited a tendency to discriminate in price. A license fee based upon a percentage of gross revenue is discriminatory in that it grants the same number of rights to different licensees for different total dollar amounts, depending upon their ability to pay. The effectiveness of price discrimination is significantly enhanced by the all-or-nothing blanket license."

[18] Under the ASCAP consent decree, on receipt of an application, ASCAP is required to "advise the applicant in writing of the fee which it deems reasonable for the license requested." If the parties are unable to agree on the fee within 60 days of the application, the applicant may apply to the United States District Court for the Southern District of New York for the determination of a "reasonable fee." *United States* v. *ASCAP*, 1950–1951 Trade Cases ¶ 62,595, p. 63,754 (SDNY 1950). The BMI decree contains no similar provision for judicial determination of a reasonable fee.

a competitive system. It is a classic example of economic discrimination.

The record plainly establishes that there is no price competition between separate musical compositions.[19] Under a blanket license, it is no more expensive for a network to play the most popular current hit in prime time than it is to use an unknown composition as background music in a soap opera. Because the cost to the user is unaffected by the amount used on any program or on all programs, the user has no incentive to economize by, for example, substituting what would otherwise be less expensive songs for established favorites or by reducing the quantity of music used on a program. The blanket license thereby tends to encourage the use of more music, and also of a larger share of what is really more valuable music, than would be expected in a competitive system characterized by separate licenses. And since revenues are passed on to composers on a basis reflecting the character and frequency of the use of their music,[20] the tendency is to increase the rewards of the established composers at the expense of those less well known. Perhaps the prospect is in any event unlikely, but the blanket license does not present a new songwriter with any opportunity to try to

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[19] ASCAP's economic expert, Robert Nathan, was unequivocal on this point:

"Q. Is there price competition under this system between separate musical compositions?

"A. No sir." Tr. 3983.

[20] See 562 F. 2d, at 136 n. 15. In determining royalties ASCAP distinguishes between feature, theme, and background uses of music. The 1950 amended decree requires ASCAP to distribute royalties on "a basis which gives primary consideration to the performance of the compositions." The 1960 decree provided for the additional option of receiving royalties under a deferred plan which provides additional compensation based on length of membership and the recognized status of the individual's works. See *United States* v. *ASCAP*, 1960 Trade Cases ¶ 69,612, pp. 76,469–76,470 (SDNY 1960).

break into the market by offering his product for sale at an unusually low price. The absence of that opportunity, however unlikely it may be, is characteristic of a cartelized rather than a competitive market.[21]

The current state of the market cannot be explained on the ground that it could not operate competitively, or that issuance of more limited—and thus less restrictive—licenses by ASCAP is not feasible. The District Court's findings disclose no reason why music-performing rights could not be negotiated on a per-composition or per-use basis, either with the composer or publisher directly or with an agent such as ASCAP. In fact, ASCAP now compensates composers and publishers on precisely those bases.[22] If distributions of royalties can be calculated on a per-use and per-composition basis, it is difficult to see why royalties could not also be collected in the same way. Moreover, the record also shows that where ASCAP's blanket-license scheme does not govern, competitive markets do. A competitive market for "synch" rights exists,[23] and after the use of blanket licenses in the motion picture industry was discontinued,[24] such a market promptly developed in that industry.[25] In sum, the record demonstrates that the market at issue here is one that could be highly competitive, but is not competitive at all.

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[21] See generally 2 P. Areeda & D. Turner, Antitrust Law 280–281, 342–345 (1978); Cirace, *supra* n. 15, at 286–292.

[22] See n. 20, *supra*.

[23] The "synch" right is the right to record a copyrighted song in synchronization with the film or videotape, and is obtained separately from the right to perform the music. It is the latter which is controlled by ASCAP and BMI. See *CBS, Inc.* v. *ASCAP*, 400 F. Supp., at 743.

[24] See *Alden-Rochelle, Inc.* v. *ASCAP*, 80 F. Supp. 888 (SDNY 1948).

[25] See 400 F. Supp., at 759–763; 5 Jt. App. in CA2 No. 75–7600, pp. 775–777 (testimony of Albert Berman, managing director of the Harry Fox Agency, Inc.). Television synch rights and movie performance and synch rights are handled by the Fox Agency, which serves as the broker for thousands of music publishers.

IV

Since the record describes a market that could be competitive and is not, and since that market is dominated by two firms engaged in a single, blanket method of dealing, it surely seems logical to conclude that trade has been restrained unreasonably. ASCAP argues, however, that at least as to CBS, there has been no restraint at all since the network is free to deal directly with copyright holders.

The District Court found that CBS had failed to establish that it was compelled to take a blanket license from ASCAP. While CBS introduced evidence suggesting that a significant number of composers and publishers, satisfied as they are with the ASCAP system, would be "disinclined" to deal directly with the network, the court found such evidence unpersuasive in light of CBS's substantial market power in the music industry and the importance to copyright holders of network television exposure.[26] Moreover, it is arguable that CBS could go further and, along with the other television networks, use its economic resources to exploit destructive competition among purveyors of music by driving the price of performance rights down to a far lower level. But none of this demonstrates that ASCAP's practices are lawful, or that ASCAP cannot be held liable for injunctive relief at CBS's request.

The fact that CBS has substantial market power does not deprive it of the right to complain when trade is restrained. Large buyers, as well as small, are protected by the antitrust laws. Indeed, even if the victim of a conspiracy is himself a wrongdoer, he has not forfeited the protection of the law.[27] Moreover, a conclusion that excessive competition would cause one side of the market more harm than good may justify a legislative exemption from the antitrust laws, but does not

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[26] See 400 F. Supp., at 767–771.

[27] See *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U. S. 134, 138–140; *Simpson* v. *Union Oil Co.*, 377 U. S. 13, 16–17; *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U. S. 211, 214.

constitute a defense to a violation of the Sherman Act.[28] Even though characterizing CBS as an oligopolist may be relevant to the question of remedy, and even though free competition might adversely affect the income of a good many composers and publishers, these considerations do not affect the legality of ASCAP's conduct.

More basically, ASCAP's underlying argument that CBS must be viewed as having acted with complete freedom in choosing the blanket license is not supported by the District Court's findings. The District Court did not find that CBS could cancel its blanket license "tomorrow" and continue to use music in its programming and compete with the other networks. Nor did the District Court find that such a course was without any risk or expense. Rather, the District Court's finding was that within a year, during which it would continue to pay some millions of dollars for its annual blanket license, CBS would be able to develop the needed machinery and enter into the necessary contracts.[29] In other words, although the barriers to direct dealing by CBS as an alternative to paying for a blanket license are real and significant, they are not insurmountable.

Far from establishing ASCAP's immunity from liability, these District Court findings, in my judgment, confirm the illegality of its conduct. Neither CBS nor any other user has been willing to assume the costs and risks associated with an attempt to purchase music on a competitive basis. The fact that an attempt by CBS to break down the ASCAP monopoly might well succeed does not preclude the conclusion that smaller and less powerful buyers are totally foreclosed from a competitive market.[30] Despite its size, CBS itself

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[28] See *National Society of Professional Engineers* v. *United States*, 435 U. S. 679, 689–690.

[29] See 400 F. Supp., at 762–765.

[30] For an individual user, the transaction costs involved in direct dealing with individual copyright holders may well be prohibitively high, at least

may not obtain music on a competitive basis without incurring unprecedented costs and risks. The fear of unpredictable consequences, coupled with the certain and predictable costs and delays associated with a change in its method of purchasing music, unquestionably inhibits any CBS management decision to embark on a competitive crusade. Even if ASCAP offered CBS a special bargain to forestall any such crusade, that special arrangement would not cure the market-wide restraint.

Whatever management decision CBS should or might have made, it is perfectly clear that the question whether competition in the market has been unduly restrained is not one that any single company's management is authorized to answer. It is often the case that an arrangement among competitors will not serve to eliminate competition forever, but only to delay its appearance or to increase the costs of new entry. That may well be the state of this market. Even without judicial intervention, the ASCAP monopoly might eventually be broken by CBS, if the benefits of doing so outweigh the significant costs and risks involved in commencing direct dealing.[31] But that hardly means that the blanket-licensing

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in the absence of any broker or agency routinely handling such requests. Moreover, the District Court found that writers and publishers support and prefer the ASCAP system to direct dealing. *Id.*, at 767. While their apprehension at direct dealing with CBS could be overcome, the District Court found, by CBS's market power and the importance of television exposure, a similar conclusion is far less likely with respect to other users.

[31] The risks involved in such a venture appear to be substantial. One significant risk, which may be traced directly to ASCAP and its members, relates to music "in the can"—music which has been performed on shows and movies already in the network's inventory, but for which the network must still secure performing rights. The networks accumulate substantial inventories of shows "in the can." And, as the Government has pointed out as *amicus curiae:*

"If they [the networks and television stations] were to discontinue the blanket license, they then would be required to obtain performance rights

policy at issue here is lawful. An arrangement that produces marketwide price discrimination and significant barriers to entry unreasonably restrains trade even if the discrimination and the barriers have only a limited life expectancy. History suggests, however, that these restraints have an enduring character.

Antitrust policy requires that great aggregations of economic power be closely scrutinized. That duty is especially important when the aggregation is composed of statutory monopoly privileges. Our cases have repeatedly stressed the need to limit the privileges conferred by patent and copyright strictly to the scope of the statutory grant. The record in this case plainly discloses that the limits have been exceeded and that ASCAP and BMI exercise monopoly powers that far exceed the sum of the privileges of the individual copyright holders.

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for these already-produced shows. This attempt would create an opportunity for the copyright owners, as a condition of granting performing rights, to attempt to obtain the entire value of the shows 'in the can.' It would produce, in other words, a case of bilateral monopoly. Because pricing is indeterminate in a bilateral monopoly, television networks would not terminate their blanket licenses until they had concluded an agreement with every owner of copyrighted music 'in the can' to allow future performance for an identified price; the networks then would determine whether that price was sufficiently low that termination of the blanket license would be profitable. But the prospect of such negotiations offers the copyrights owners an ability to misuse their rights in a way that ensures the continuation of blanket licensing despite a change in market conditions that may make other forms of licensing preferable." Brief for United States as *Amicus Curiae* 24–25.

This analysis is in no sense inconsistent with the findings of the District Court. The District Court did reject CBS's coercion argument as to music "in the can." But as the Government again points out, the District Court's findings were addressed essentially to a tie-in claim; "the court did not consider the possibility that the copyright owners' self-interested, non-coercive demands for compensation might nevertheless make the cost of CBS' dropping the blanket license sufficiently high that ASCAP and BMI could take this 'termination penalty' into account in setting fees for the blanket license." *Id.*, at 25 n. 23.

Indeed, ASCAP itself argues that its blanket license constitutes a product that is significantly different from the sum of its component parts. I agree with that premise, but I conclude that the aggregate is a monopolistic restraint of trade proscribed by the Sherman Act.

Syllabus

ALEXANDER ET AL. *v.* UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 77-874. Argued December 5, 1978—Decided April 17, 1979*

The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Relocation Act) makes relocation benefits available for individuals and businesses that satisfy the statutory definition of a "displaced person." Section 101 (6) of the Act defines that term to include "any person who . . . moves . . . as a result of the acquisition of . . . real property . . . or as a result of the written order of the acquiring agency to vacate real property, for a program or project undertaken by a Federal agency." Both of these cases involve tenants displaced from housing projects that the Department of Housing and Urban Development (HUD) acquired because the projects' sponsors defaulted on federally insured loans. Petitioners in No. 77-874 were dislocated by HUD's subsequent closing of an Indianapolis, Ind., housing project, and HUD refused to provide relocation benefits for these tenants. Petitioners then initiated this action in Federal District Court, claiming that they were "displaced persons" under the written order clause of § 101 (6). The District Court rejected the tenants' statutory construction and granted summary judgment for HUD. The Court of Appeals affirmed, holding that § 101 (6) encompasses only displacements for programs designed to benefit the public as a whole or to fulfill a public need, not dislocations caused by the irretrievable failure of a public housing project. Respondents in No. 77-1463 were displaced when HUD determined that a Washington, D. C., project should be demolished and the land sold to private developers. When HUD ordered the tenants to vacate but declined to extend assistance under the Relocation Act, respondents brought suit in Federal District Court. The court agreed that the dislocated tenants were covered by the written order clause of § 101 (6), and granted summary judgment for respondents. The Court of Appeals affirmed, holding that the written order

*Together with No. 77-1463, *Harris, Secretary of Housing and Urban Development, et al.* v. *Cole et al.*, on certiorari to the United States Court of Appeals for the District of Columbia Circuit.

clause encompasses all persons ordered to vacate so that an agency's property can be devoted to a federal program "designed for the benefit of the public as a whole." Because HUD's demolition plans met this description, the tenants HUD directed to move were considered "displaced persons."

Held:

1. The written order clause of § 101 (6) encompasses only those persons ordered to vacate in connection with the actual or proposed acquisition of property for a federal program. Pp. 49–63.

(a) Both the language and origins of the Relocation Act demonstrate that Congress intended to provide relocation assistance when property is acquired for federal programs, not to extend assistance beyond that limited context for all persons somehow displaced by Government programs. Pp. 49–53.

(b) Similarly, the legislative history of the written order clause reveals no congressional intent to extend relocation benefits beyond the acquisition context. Rather, this clause was designed to ensure that assistance is available for a distinct group of persons directed to move because of a contemplated acquisition, whether the agency ultimately acquires the property or not. Thus, the clause applies only when a proposed acquisition directly causes issuance of the notice to vacate and the property acquisition is intended to further a federal program or project. Pp. 53–59.

(c) The structure of the Relocation Act, as well as the statutory provisions specifying the benefits available for displaced persons, manifests the limited scope of § 101 (6) and the written order clause. Pp. 60–62.

(d) In essence, the written order clause embodies two causal requirements. First, the written order to vacate must result directly from an actual or contemplated property acquisition. Second, and more fundamentally, that acquisition must be "for," or intended to further, a federal program or project. In combination, these two causal requirements substantially limit applicability of the clause, so that persons directed to vacate property for a federal program cannot obtain relocation assistance unless the agency also intended at the time of acquisition to use the property for such a program or project. Thus, a program developed after the agency procures property will not suffice, even though it necessitates displacements, since that program could not have motivated the property acquisition. Pp. 62–63.

2. Here, the relationship between HUD's acquisitions and orders to

vacate does not bring the tenants within the purview of § 101 (6). Pp. 63–67.

(a) The Relocation Act's legislative history demonstrates that the mere anticipation and authorization of default acquisitions in the National Housing Act mortgage insurance programs cannot render these tenants eligible for relocation assistance under § 101 (6). By requiring that an acquisition be "for" a federal program or project, Congress intended that the acquisition must further or accomplish a program designed to benefit the public as a whole. Even assuming that the mortgage insurance programs constitute federal "programs or projects," default acquisitions arising out of those programs do not satisfy § 101 (6)'s causality requirements. Although these default acquisitions occur as a result of the mortgage insurance programs' failures, they do not further the purpose of these particular programs. Pp. 64–65.

(b) In addition, HUD's adoption of a property management plan cannot retroactively establish the requisite purpose for acquiring property in the first instance. P. 65.

(c) Even though HUD's demolition plan in No. 77–1463 is the type of program or project to which § 101 (6) refers, HUD did not *acquire* the project for that purpose. The statute requires more than a causal connection between the order to vacate and the demolition program. The program or project must also be the reason for acquiring the property. Without the requisite relationship between the demolition program and the acquisition, HUD's proposal for disposing of the housing project is no different than any other property management plan, insufficient by itself to confer eligibility under § 101 (6). Pp. 65–66.

No. 77–874, 555 F. 2d 166, affirmed; No. 77–1463, 187 U. S. App. D. C. 156, 571 F. 2d 590, reversed.

MARSHALL, J., delivered the opinion for a unanimous Court.

John Vanderstar argued the cause for petitioners in No. 77–874 and for respondents in No. 77–1463. With him on the briefs were *Theodore Voorhees, Jr., Richard L. Zweig, Paul Levy,* and *Florence Wagman Roisman.*

William C. Bryson argued the cause for respondents in No. 77–874 and petitioners in No. 77–1463. With him on the brief were *Solicitor General McCree, Assistant Attorney General Moorman, Deputy Solicitor General Barnett, Jacques B. Gelin,* and *Robert L. Klarquist.*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

These cases require us to interpret the definition of a "displaced person" set forth in the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Relocation Act), 84 Stat. 1894, 42 U. S. C. § 4601 *et seq.* Section 101 (6) of the Act defines a "displaced person" as

> "any person who . . . moves . . . as a result of the acquisition of . . . real property, . . . or as the result of the written order of the acquiring agency to vacate real property, for a program or project undertaken by a Federal agency . . . ." 42 U. S. C. § 4601 (6).[1]

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[1] Section 101 (6) provides in its entirety:

"The term 'displaced person' means any person who, on or after the effective date of this Act, moves from real property, or moves his personal property from real property, as a result of the acquisition of such real property, in whole or in part, or as the result of the written order of the acquiring agency to vacate real property, for a program or project undertaken by a Federal agency, or with Federal financial assistance; and solely for the purposes of sections 202 (a) and (b) and 205 of this title, as a result of the acquisition of or as the result of the written order of the acquiring agency to vacate other real property, on which such person conducts a business or farm operation, for such program or project." 84 Stat. 1894, 42 U. S. C. § 4601 (6).

Section 101 (5) of the Act defines a "person" to mean "any individual, partnership, corporation, or association." 84 Stat. 1894, 42 U. S. C. § 4601 (5).

The definition of a "displaced person" governs basic eligibility for the several types of assistance available under the Relocation Act. Section 202 of the Act provides reimbursement for reasonable moving expenses, direct losses that result from moving or discontinuing a business or farm operation, and expenses incurred in searching for a replacement business or farm. In lieu of reimbursement for actual expenses, § 202 authorizes payment of a fixed sum to eligible persons, here a $300 moving expense allowance and a $200 dislocation allowance. 84 Stat. 1895, 42 U. S. C. § 4622; see 24 CFR §§ 42.65–42.80 (1978); *infra*, at 60. Sections 203 and 204 permit replacement housing payments of up to $15,000 for homeowners and $4,000 for tenants, provided certain need and occupancy requirements are satisfied. 84 Stat. 1896, 1897, 42 U. S. C. §§ 4623, 4624;

Relocation benefits are available under the Act for individuals and businesses that satisfy either the "acquisition" or "written order" clause of this definition. Because the Courts of Appeals for the Seventh and District of Columbia Circuits have adopted conflicting interpretations of the written order clause,[2] we granted certiorari. 437 U. S. 903 (1978).

Both cases involve housing projects that the Department of Housing and Urban Development (HUD) acquired after the projects' sponsors defaulted on federally insured loans. We must determine whether the written order clause encompasses the tenants required to vacate those housing projects, even though HUD's orders to vacate were not motivated by a governmental acquisition of property to further a public program or project.

I

A

Petitioners in No. 77–874 are 17 former tenants of the Riverhouse Tower Apartments, a low- and middle-income housing project in Indianapolis, Indiana. This complex was built in the late 1960's by a private nonprofit corporation, Riverhouse Apartments, Inc., whose mortgage HUD insured and subsidized pursuant to § 221 (d)(3) of the National Housing Act, 75 Stat. 150, as amended, 12 U. S. C. § 1715*l* (d)(3). Upon completion of the project, the Government National Mortgage Association (GNMA) purchased the mortgage from

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see 24 CFR §§ 42.90, 42.95 (1978); *infra*, at 61. Finally, § 205 requires agencies to establish a program of relocation assistance advisory services for displaced persons. 84 Stat. 1897, 42 U. S. C. § 4625; see 24 CFR §§ 42.100–42.125 (1978); *infra*, at 60.

[2] 555 F. 2d 166 (CA7 1977); 187 U. S. App. D. C. 156, 571 F. 2d 590 (1977). See also *Blount* v. *Harris*, 593 F. 2d 336 (CA8 1979); *Burns* v. *United States*, Civ. No. 4–76–237 (DC Minn., July 11, 1978). See generally *Harris* v. *Lynn*, 555 F. 2d 1357, 1359–1360 (CA8) (aff'g 411 F. Supp. 692 (ED Mo. 1976)), cert. denied, 434 U. S. 927 (1977); *Caramico* v. *Secretary, Dept. of HUD*, 509 F. 2d 694, 697–699 (CA2 1974).

the private lender in accordance with § 221 (d)(3) of the Housing Act. When Riverhouse Apartments, Inc., defaulted on the loan in July 1970, GNMA assigned the mortgage to HUD in exchange for payment of the statutory mortgage benefits. Three years later, HUD initiated foreclosure proceedings, and a court-appointed receiver assumed operation of the project until HUD purchased the property at a foreclosure sale in August 1974.

HUD initially retained a management agent to continue operating the newly acquired project. However, the condition of the property had deteriorated so seriously during the period of default that HUD soon decided to close the apartment complex. Notices to quit were served on all remaining tenants in November 1974, and by the following February, the buildings were vacant. HUD refused to provide relocation benefits for these dislocated tenants or to disclose its plans regarding the terminated project.[3]

Petitioners then initiated this action in Federal District Court, claiming, *inter alia*, that they were "displaced persons" entitled to assistance under the Relocation Act.[4] Construing the written order clause of § 101 (6) literally, the tenants argued that they had moved upon receiving written orders to vacate property acquired by a Government agency. The District Court rejected this statutory construction and granted summary judgment for HUD. *Blades* v. *Dept. of HUD*, Civ. No. IP 74–706–C (SD Ind., July 1, 1976). The Court of Appeals for the Seventh Circuit affirmed. In its view, § 101 (6) encompasses only displacements for programs designed to ben-

[3] It now appears that a private party contracted in July 1977 to purchase Riverhouse Towers Apartments from HUD and that the sale has since been consummated. Brief for Petitioners in No. 77–874, pp. 37–38 (letter from Department of HUD, Office of General Counsel, to Mr. Richard L. Zweig).

[4] The tenants sought judicial review under the Administrative Procedure Act, 5 U. S. C. § 701 *et seq.*, of HUD's refusal to provide relocation assistance. Jurisdiction was predicated on 28 U. S. C. §§ 1337, 1346.

efit the public as a whole or to fulfill a public need, not dislocations caused by the irretrievable failure of a public housing project. 555 F. 2d 166, 169–170 (1977).[5]

B

The tenants in No. 77–1463 formerly occupied the Sky Tower apartment complex built in Washington, D. C., during the 1950's. A nonprofit corporation purchased Sky Tower in 1970, intending to convert a number of its small "garden" apartments into larger units for low- and moderate-income families. HUD agreed to assist in the rehabilitation by insuring the corporation's mortgage on the complex and subsidizing its interest payments, pursuant to § 236 of the National Housing Act, 82 Stat. 498, as amended, 12 U. S. C. § 1715z–1. Difficulties with two successive general contractors eventually prevented the corporate sponsor from making interest payments on its loan. As a result, the mortgagee declared the sponsor in default, foreclosed on the mortgage, and conveyed title to HUD in exchange for the statutory mortgage insurance benefits. See 12 U. S. C. §§ 1713 (g), (k).

After acquiring title to Sky Tower in June 1973, HUD hired a management agent to continue operating the partially rehabilitated complex. By September 1974, however, HUD realized that Sky Tower's deteriorated condition would render any further efforts at rehabilitation futile. The agency therefore planned to demolish the buildings and sell the land to private developers for construction of single-family homes.

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[5] In addition to their Relocation Act claims, several tenants alleged in the complaint that HUD should not have applied their security deposits to offset rent deficiencies. The tenants contended that HUD had breached an implied warranty of habitability for the relevant period, thereby relieving them of any obligation to pay rent. Deciding the issue under federal law, the District Court held that no such warranty could be implied in the tenants' leases. The Court of Appeals affirmed. 555 F. 2d, at 170–171. The tenants have not challenged this aspect of the Court of Appeals' decision, and we therefore do not consider the issue.

When the 72 families living in the complex were ordered to vacate, HUD declined to extend assistance under the Relocation Act.[6]

A group of the Sky Tower tenants brought this suit in Federal District Court, challenging HUD's decision to raze the complex and its refusal to provide full relocation benefits. The District Court preliminarily enjoined HUD from completing the demolition, and subsequently granted summary judgment for the tenants on the benefits issue. Civ. Action No. 74–1872 (DC, Sept. 12, 1975).[7] A divided panel of the Court of Appeals for the District of Columbia Circuit agreed that these tenants were "displaced persons" under the written order clause of § 101 (6). 187 U. S. App. D. C. 156, 161, 571 F. 2d 590, 595 (1977). In so ruling, the Court of Appeals rejected HUD's argument that § 101 (6) reaches only persons dislocated by an agency's purposeful acquisition of property for use in certain types of government programs. The court instead considered the written order clause applicable whenever an agency orders persons to vacate so that property can be devoted to a federal program " 'designed for the benefit of the public as a whole.' " 187 U. S. App. D. C., at 161, 571

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[6] Although HUD did provide minimal reimbursement for moving expenses, it made these $300 payments on an emergency basis "under the general authority of the Housing Act," and not pursuant to any provision of the Relocation Act. Tr. of Oral Arg. 30.

[7] The preliminary injunction barred HUD from completing the demolition or the evictions, required the agency to rehabilitate certain buildings, and allowed the evicted tenants to return at the Department's expense. *Cole* v. *Lynn*, 389 F. Supp. 99 (DC 1975); *Cole* v. *Hills*, 396 F. Supp. 1235 (DC 1975). While the benefits issue was pending on appeal pursuant to Fed. Rule Civ. Proc. 54 (b), the parties agreed that the District Court should remand the remaining issues to HUD, so the agency could reconsider the proper disposition of Sky Tower. On remand, the agency abandoned the demolition plan and arranged to transfer ownership of the housing complex to the District of Columbia government, with HUD continuing to provide substantial rent subsidies. 187 U. S. App. D. C., at 160 n. 17, 571 F. 2d, at 594 n. 17.

F. 2d, at 595. In the court's view, HUD's demolition plan met this description. *Ibid.*[8]

II

Section 101 (6) of the Relocation Act, as previously indicated, provides that a "displaced person" is one who moves "as a result of the acquisition of . . . real property, . . . or as the result of the written order of the acquiring agency to vacate real property, for a program or project undertaken by a Federal agency . . . ." 42 U. S. C. § 4601 (6). In neither case do the tenants claim coverage under the "acquisition" clause of § 101 (6), which reaches persons dislocated by the actual procurement of property for a federal program or project. Brief for Respondents in No. 77–1463, p. 15, and n. 17; Tr. of Oral Arg. 10. Hence, these tenants' eligibility for relocation assistance turns on the meaning of the definition's written order clause. More precisely, their eligibility depends on the import of two critical phrases not specifically defined in the Act, "acquiring agency" and "for a program or project."

The tenants contend that "acquiring agency" simply denotes a governmental body that has previously acquired property and that eventually orders persons to vacate. In contrast, HUD reads the phrase as a shorthand description of an agency currently engaged in the process of acquiring property. Under HUD's construction, the written order clause contains an implicit acquisition requirement. The clause thus construed does not apply unless an agency's proposed acquisition of property

[8] After we granted certiorari in these cases, Congress enacted the Housing and Community Development Amendments of 1978, Pub. L. 95–557, 92 Stat. 2080. That legislation directs HUD to re-examine its property management and disposition program, see § 203, 92 Stat. 2088, 12 U. S. C. § 1701z–11 (1976 ed., Supp. II); § 902, 92 Stat. 2125, and to ensure that tenants displaced from property owned by HUD will receive any relocation assistance available under other statutory provisions, § 203 (d). However, these provisions do not affect the Relocation Act's definition of a "displaced person." See H. R. Conf. Rep. No. 95–1792, pp. 67–71, 99–100 (1978).

directly causes issuance of the displacing order, whereas the tenants' interpretation demands no immediate causal connection between the procurement of property and the order to vacate.

The parties also disagree about the proper referent for the phrase, "for a program or project." [9] HUD contends that this phrase modifies the acquisition requirement included in the written order clause. Consequently, "for a program or project" specifies the agency's original purpose in acquiring property, not just its purpose in issuing an order to vacate. Under this construction, the written order clause applies only if an agency issues its notice to vacate pursuant to an actual or proposed acquisition of property intended to further a federal program. Thus, tenants of a housing project acquired by the Government because of the owner's loan default would not be eligible for relocation assistance when the acquiring agency later adopts a program necessitating their displacement.

The tenants, on the other hand, read "for a program or project" as referring solely to the written order. The phrase therefore identifies the agency's reason for ordering persons to vacate, but does not make eligibility depend on the agency's

[9] In its entirety, this phrase encompasses any "program or project undertaken by a Federal agency, or with Federal financial assistance." § 101 (6), 42 U. S. C. § 4601 (6). Lower federal courts have interpreted the latter part of this phrase to include only federally assisted "programs or projects" undertaken by agencies of state and local governments, as opposed to private parties. See *Moorer* v. *Dept. of HUD*, 561 F. 2d 175 (CA8 1977), cert. denied, 436 U. S. 919 (1978); *Dawson* v. *U. S. Dept. of HUD*, 428 F. Supp. 328 (ND Ga. 1976); *Parlane Sportswear Co.* v. *Weinberger*, 381 F. Supp. 410 (Mass. 1974), aff'd, 513 F. 2d 835, 837 (CA1), cert. denied, 423 U. S. 925 (1975). Although the present cases do require us to consider what types of "programs or projects" Congress intended to cover, *infra*, at 63–67, we need not determine whether § 101 (6) applies when private parties undertake such a program and acquire property, since the tenants here have claimed that the program of a federal agency caused their displacement. Similarly, these cases do not require us to construe the provisions applicable when a state or local agency acquires property for use in a covered program or project. See 42 U. S. C. §§ 4627–4633, 4635.

original purpose in acquiring the property. According to this analysis, the written order clause covers any individual who receives a written order to vacate property that an agency has previously acquired, provided the *displacement* is "for" a federal program or project. Moreover, the tenants broadly construe "program or project" to include any governmental program designed to fulfill a public need.

The statutory language is susceptible of either construction. However, an examination of Congress' purpose in adopting the Relocation Act, the legislative history of § 101 (6), and the structure of the Act as a whole persuades us that HUD's interpretation more nearly reflects the intended scope of this assistance program.

A

Passage of the Relocation Act in 1970 concluded nearly a decade of congressional effort to standardize federal legislation regarding relocation assistance. Prior to the 1960's, Congress had enacted special provisions to assist persons displaced when particular federal agencies acquired property for designated public projects.[10] As a result, relocation benefits varied substantially from program to program. The House Public Works Committee responded to these variations in 1961 by creating the Select Subcommittee on Real Property Acquisition. In 1964, this Subcommittee submitted a lengthy Report concerning the deficiencies of existing law, and its proposed "Fair Compensation Act" became the basis for most of the provisions ultimately codified in the Relocation Act.[11]

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[10] See, *e. g.*, Tennessee Valley Authority Act of 1933, ch. 32, 48 Stat. 58, as amended, 49 Stat. 1080; Act to Authorize Certain Construction of Military and Naval Installations, Pub. L. 82–155, § 501 (b), 65 Stat. 364; Act of May 29, 1958, Pub. L. 85–433, 72 Stat. 152, 43 U. S. C. § 1231 (1964 ed.), repealed by uncodified § 220 (a)(1) of the Relocation Act, 84 Stat. 1903.

[11] Select Subcommittee on Real Property Acquisition of the House Committee on Public Works, Study of Compensation and Assistance for

The proposed Fair Compensation Act unambiguously reflects Congress' limited purpose in revising the special relocation legislation. The Act's declared purpose was to afford "persons affected by the *acquisition of real property in Federal* and federally assisted *programs* . . . fair and equitable treatment on a basis as nearly uniform as practicable." Select Subcommittee Study 147 (emphasis added); see *id.*, at 1–2, 122. This statement of policy embodied Congress' recognition that existing law provided relocation benefits only to those persons dislocated by governmental acquisitions of property for use in public projects.[12] And in accord with its mandate, the Select Subcommittee drafted the replacement legislation to standardize and improve the assistance provided within that particular context.[13] Thus, both the language and origins of the Relocation Act demonstrate that Congress initially intended to provide better relocation assistance when property is acquired for federal programs, not to extend assistance beyond that limited context to all persons somehow displaced by governmental programs.[14]

Persons Affected by Real Property Acquisition in Federal and Federally Assisted Programs, 88th Cong., 2d Sess., 145–167 (Comm. Print 1965) (hereinafter Select Subcommittee Study).

[12] See *id.*, at 93–104, 194–207. The sole exception to this pattern was contained in § 310 of the Housing Act of 1964, 78 Stat. 788, 42 U. S. C. § 1465 (1970 ed.), repealed by uncodified § 220 (a)(5) of the Relocation Act, 84 Stat. 1903. Section 310 extended benefits to persons displaced from urban renewal areas by code enforcement activities and by programs of voluntary rehabilitation in accordance with an urban renewal plan. Congress treated this provision as an exception to the general rule when it drafted the Fair Compensation Act and the successor bills. See *infra*, at 61–62, and nn. 20, 40.

[13] See *infra*, at 53, and n. 20.

[14] The tenants contend that Congress legislated against a broader background and therefore must have intended the Fair Compensation Act and the Relocation Act to apply outside the acquisition context. For support, they rely on § 123 of the Housing Act of 1954, 68 Stat. 596, 599–600,

Congress' basic objective remained unchanged through succeeding legislative sessions as it considered a number of bills derived from the proposed Fair Compensation Act. During this period, the individual sponsors and the Senate Committee on Government Operations altered slightly the language used to declare Congress' purpose, but the meaning was unaffected.[15] Thus, the original "Declaration of Policy" in S. 1, 91st Cong., 1st Sess., § 201 (1969), the bill finally enacted as the Relocation Act, stated that the legislation was designed

> "to establish a uniform policy for the fair and equitable treatment of owners, tenants, and other persons *displaced by the acquisition of real property in Federal* and federally assisted *programs* to the end that such persons shall not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole." (Emphasis added.)

This language leaves little doubt that Congress' concern was

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as amended, 12 U. S. C. §§ 1715k, 1715*l*, which facilitated the relocation of displaced individuals yet did not depend on the acquisition of property for a federal project. However, § 123 was not in any sense a relocation benefits statute, but rather an aspect of the mortgage insurance program designed to encourage the development of housing for families displaced by governmental action. See 68 Stat. 599. Section 123 therefore was merely tangential to Congress' immediate goal of revising legislation that directly assisted dislocated persons. Accordingly, the proposed Fair Compensation Act did not include § 123 among the provisions to be repealed upon adoption of the replacement legislation. See Select Subcommittee Study 159.

[15] See S. 1201, 89th Cong., 1st Sess., § 2 (1965); S. 1681, 89th Cong., 1st Sess., § 2 (1965); S. Rep. No. 1378, 89th Cong., 2d Sess., 1 (1966); S. 698, 90th Cong., 1st Sess., § 801 (1967) (as introduced); S. 698, 90th Cong., 2d Sess., § 701 (1968) (as reported by Committee); S. Rep. No. 1456, 90th Cong., 2d Sess., 11, 24 (1968). Congress' failure to enact comprehensive relocation legislation until 1970 was due not to any dispute over the purpose of the bills, but rather to the inability of both Houses to complete action before the end of the earlier legislative sessions. See S. Rep. No. 91–488, pp. 4–7 (1969); 116 Cong. Rec. 40168 (1970) (Rep. Fallon).

still with displacements caused by the acquisition of property for a Government program or project.[16]

In arguing that Congress had a broader purpose, to provide relocation assistance outside the acquisition context, the tenants rely on language adopted by the House of Representatives after the Senate passed S. 1. When the House Committee on Public Works reorganized and shortened the bill's provisions into their final form, it also streamlined the "Declaration of Policy" by deleting the references to acquisitions of property. Consequently, § 201 of the Relocation Act simply refers to "persons displaced as a result of Federal and federally assisted programs," [17] and the tenants suggest that all such persons are the intended beneficiaries of the statute. However, the tenants' interpretation of this language is plainly inconsistent with prior versions of the section, all of which expressly related to displacements caused by the acquisition of property for the programs specified in § 201.[18] Nothing in the legislative materials suggests that this late revision in the Act's statement of purpose reflected any substantive departure from Congress' previous statutory design.[19] Indeed, the House Committee that shortened the Declaration of Policy stated in its Report that the bill "provides for relief of the economic

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[16] See also the Senate Committee's description of the purpose for this legislation, S. Rep. No. 91–488, pp. 10, 13 (1969), and the discussion of this bill on the Senate floor. 115 Cong. Rec. 31370–31376, 31533–31535 (1969).

[17] Section 201 declares:

"The purpose of this title is to establish a uniform policy for the fair and equitable treatment of persons displaced as a result of Federal and federally assisted programs in order that such persons shall not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole." 84 Stat. 1895, 42 U. S. C. § 4621.

[18] See n. 15, *supra*.

[19] See H. R. Rep. No. 91–1656 (1970); 116 Cong. Rec. 40163–40172 (1970) (House debate); *id.*, at 42139 (Senate acceptance of House modifications); *id.*, at 42506–42507 (final House approval).

dislocation which occurs in the acquisition of real property for Federal and federally assisted programs." H. R. Rep. No. 91–1656, p. 3 (1970). Accordingly, the consistent purpose underlying this legislation persuades us that Congress intended the written order clause to apply only when an agency proposes acquiring property to further a federal program or project.

B

The legislative history specifically concerning the definition of a displaced person reinforces our conclusion. Prior versions of § 101 (6) encompassed only persons dislocated by actual or proposed property acquisitions, and in particular, those acquisitions intended to further federal programs and projects. The legislative materials demonstrate that when Congress added the written order clause to this definition, its purpose was to delineate more precisely a subcategory of the originally intended beneficiaries, consisting of those who move in anticipation that a property acquisition for a federal program will necessitate their displacement. Viewed in context, the written order clause addresses a special situation related to unconsummated property acquisitions, not all displacements loosely connected with Government programs.

The definition of a displaced person originated in the proposed Fair Compensation Act. Section 115 defined the term to include persons and businesses that move from real property "as a result of the acquisition or imminence of acquisition of such real property, in whole or in part, by a Federal or State agency." Select Subcommittee Study 157–158. That this choice of language was deliberate can be seen from other provisions of the Act, which authorized relocation assistance only when the "head of any Federal agency acquires real property for public use." [20]

[20] Sections 107 and 108 of the Fair Compensation Act, Select Subcommittee Study 151–152. In addition to these operative sections of the proposed Act, the special benefits provision contained in § 113 of the Act re-

The version of the Fair Compensation Act introduced in the next Congress adopted the same definition of a displaced person.[21] However, witnesses during the Senate hearings criticized the phrase "or imminence of acquisition" as too ambiguous to provide guidance for agencies and potential displacees.[22] In response, the Senate Committee on Government Operations amended the phrase to read "or reasonable expectation of acquisition," thereby incorporating an objective standard of eligibility.[23] The limited scope of this amend-

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flected the limited scope of the term "displaced person." Section 310 of the Housing Act of 1964 provided relocation assistance in a few situations not involving governmental property acquisitions. See n. 12, *supra*. In recognition that beneficiaries of this program would not be "displaced persons" under the Fair Compensation Act, the Select Subcommittee included a special provision to preserve this program when the existing relocation legislation was repealed. The special benefits provision, § 113 of the proposed Act, directed that persons who move "as the direct result of code enforcement activities undertaken in connection with an urban renewal project, or a program of voluntary rehabilitation of buildings or other improvements in accordance with an urban renewal plan" shall be deemed "displaced person[s]." Select Subcommittee Study 157.

That similar provisions were included in subsequent Senate bills demonstrates that Congress intentionally restricted the definition of a "displaced person" to application in the property acquisition context. See S. 1201, 89th Cong., 1st Sess., § 113 (1965); S. 1681, 89th Cong., 1st Sess., § 10 (1965); S. Rep. No. 1378, 89th Cong., 2d Sess., 8, 32–33 (1966); S. 698, 90th Cong., 1st Sess., § 808 (1967); S. Rep. No. 1456, 90th Cong., 2d Sess., 32 (1968); S. 1, 91st Cong., 1st Sess., § 232 (1969); n. 40, *infra*. This provision was ultimately enacted as § 217 of the Relocation Act, 84 Stat. 1902, 42 U. S. C. § 4637. See *infra*, at 61–62.

[21] S. 1681, 89th Cong., 1st Sess., § 12 (2) (1965); see also S. 1201, 89th Cong., 1st Sess., § 115 (2) (1965).

[22] Hearings on S. 1201 and S. 1681 before the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations, 89th Cong., 1st Sess., 55, 90 (1965).

[23] S. 1681, 89th Cong., 1st Sess., § 11 (b) (July 20, 1966). The Senate Committee substituted this language as well in the bill's definition of "displaced," since the Senate bill and its successors also employed this term to impose the same eligibility requirements as the definition of a "displaced person." See *id.*, § 11 (m); n. 31, *infra*.

ment, as well as the definition, is apparent from the Committee's explanation that the change was designed

> "to remove some of the ambiguities surrounding the meaning of 'imminence' and to make it amply clear that this legislation applies to persons who move from property to be acquired in connection with a Federal or federally assisted program when or shortly after the proposed project is announced, and when the announcement is made substantially prior to the time the project is to be put into effect." S. Rep. No. 1378, 89th Cong., 2d Sess., 9 (1966).

This passage and others in the Senate Committee Report [24] clearly indicate that Congress framed the definition to reach only persons displaced by actual or planned acquisitions of property. These materials also demonstrate that Congress restricted the definition even further by focusing exclusively on property acquisitions for use in federal programs and projects.[25]

The Senate's amended definition of a displaced person was retained in the relocation bills proposed in succeeding legislative sessions, including the original version of the bill finally enacted as the Relocation Act, S. 1, 91st Cong., 1st Sess., § 105 (1969).[26] The Senate passed this bill with only minor amendments and without significant debate.[27] But the House Committee on Public Works amended the definition of a

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[24] See, *e. g.*, S. Rep. No. 1378, 89th Cong., 2d Sess., 1 (1966) ("The purpose of S. 1681, as amended, is to establish a uniform policy for the fair and equitable treatment of owners, tenants, and other persons displaced by the acquisition of real property for Federal and federally assisted programs").

[25] *Id.*, at 1, 9, 10–11, 17, 26, 30; 112 Cong. Rec. 16733, 16735, 16737–16740 (1966).

[26] S. 698, 90th Cong., 1st Sess., § 113 (1967) (as introduced); *id.*, § 112 (as reported by Committee). See also n. 29, *infra*.

[27] S. Rep. No. 91–488 (1969); 115 Cong. Rec. 31370–31376, 31533–31535 (1969).

displaced person when reorganizing the bill's provisions into their final form.[28] This late amendment added the clause on which the tenants base their argument that relocation assistance was intended for all persons displaced by Government programs.

The contemporaneous legislative materials, however, refute the tenants' interpretation of the written order clause. During the House hearings on the relocation bills, a number of witnesses criticized even the "reasonable expectation of acquisition" language as overly vague.[29] To remedy this problem, representatives of the United States Department of Transportation and HUD recommended relating the expectation of acquisition to a readily discernible official act, so that persons who justifiably relied on agency representations could still obtain reimbursement even if the agency later failed to complete the acquisition.[30] The House Committee accepted this suggestion and replaced "or reasonable expectation of acquisition" with "or as the result of the written order of the

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[28] H. R. Rep. No. 91–1656, pp. 4–5 (1970); S. 1, 91st Cong., 2d Sess., § 101 (6) (Dec. 2, 1970).

[29] Uniform Relocation Assistance and Land Acquisitions Policies—1970: Hearings on H. R. 14898, H. R. 14899, S. 1 and Related Bills before the House Committee on Public Works, 91st Cong., 1st and 2d Sess., 137, 281, 416, 595–596, 1028 (1969–1970) (hereinafter 1970 House Hearings). Some witnesses suggested that S. 1 be amended by adding a "subsequent acquisition" requirement to the definition of a displaced person. 1970 House Hearings 137, 281–282, 416. The subsequent acquisition language would have precluded awarding any relocation assistance when an agency failed to consummate an acquisition, no matter how reasonable the expectation of acquisition had been. This suggestion was based on the definition used in H. R. 14898, 91st Cong., 1st Sess. (1969), a companion relocation proposal, which in turn was derived from the Highway Relocation Assistance provisions of the Federal-Aid Highway Act of 1968, § 30, 82 Stat 830, repealed by uncodified § 220 (a)(10) of the Relocation Act, 84 Stat. 1903.

[30] The Department of Transportation's representative testified:

"We think some limitation [on the expectation of acquisition] is desirable. Relocation payments should be limited to persons actually displaced

acquiring agency to vacate real property." [31] Thus, the sole objective underlying the present written order clause was to delineate more precisely the persons eligible for assistance as a result of planned, but unconsummated, acquisitions of property for federal programs.

The House Committee Report and floor debate also reflect this limited purpose. Based on the previously understood scope of this legislation and on testimony given during the House hearings,[32] the House Committee was well aware that

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or who move due to some official act of the public authorities such as a notice of condemnation." 1970 House Hearings 596.

The representative from HUD agreed, recommending that:

"Relocation payments should not be made to those who move on the basis of speculation regarding the intent to take their property. We favor a provision limiting reimbursement to persons [who move] after some official act which clearly threatens displacement even though the property is never subsequently acquired." *Id.*, at 1027–1028.

Both representatives referred the House Committee to their own agencies' relocation regulations, which based eligibility for benefits on the occurrence of an "official act" before the actual acquisition. *Id.*, at 1007, 1069.

[31] S. 1, 91st Cong., 2d Sess., § 101 (6) (Dec. 2, 1970), enacted as 42 U. S. C. § 4601 (6). The House Committee also consolidated all of S. 1's subcategories of "displaced persons" into one provision, § 101 (6), along with the definition of "displaced." This consolidation did not affect language pertinent to the issues raised here.

[32] Several witnesses remarked that the unamended definition of a displaced person would exclude those dislocated by activities other than property acquisitions. 1970 House Hearings 234, 241, 252–253, 270, 350–351, 360. Many of these comments were directed in particular toward H. R. 14898, which did not contain a provision continuing the availability of benefits for persons displaced by code enforcement activities and rehabilitation in urban renewal projects. See n. 12, *supra*. A few witnesses recommended that the House Committee rectify the omission by adding a provision similar to that contained in the Fair Compensation Act, see n. 20, *supra*, or the S. 1 provision that later became § 217 of the Relocation Act. 1970 House Hearings 234, 241, 252–253, 270. Other witnesses proposed a more general expansion to cover persons displaced in the absence of an acquisition. *Id.*, at 350–351, 360. All of these witnesses,

the unamended definition of a displaced person excluded those displaced by means other than property acquisitions for public projects. The Committee presumably would have articulated any intent to extend coverage beyond the acquisition context or to eliminate the requirement that an acquisition be for a federal program.[33] Instead, the House Report simply explained that under the new written order clause, "[i]f a person moves as the result of such a notice to vacate, it makes no difference whether or not the real property *actually* is acquired." H. R. Rep. No. 91–1656, p. 4 (1970) (emphasis added).[34] Similarly, the Report observed in reference to the entire definition of a displaced person, "[t]he controlling point is that the real property must be acquired for a Federal or Federal financially assisted program or project." *Ibid.*[35]

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however, agreed that given the language used to define a displaced person, an additional provision was needed to accomplish these extensions.

[33] This principle is especially applicable here, since witnesses had advocated such a wide range of adjustments in coverage. One group urged that coverage not be available unless property was actually acquired, see n. 29, *supra*, while another group requested the Committee to authorize relocation benefits generally outside the acquisition context. See n. 32, *supra*. The lack of any evidence that the Committee intended to accept either suggestion strongly indicates that the written order clause was designed solely to eliminate the vagueness inherent in the prior definition.

[34] The tenants contend that the written order clause cannot in fact serve the purpose urged by HUD, because only an agency that already has acquired property is empowered to "order" persons to move from the property. This argument attributes too much significance to the word "order." As shown by the passage quoted in text, the Committee generally referred to a "notice to vacate." The Committee's description of the clause, as well as its origin, demonstrates that a "written order" indicates any official notice to vacate, whether issued before or after the acquisition is completed. See also S. Rep. No. 1378, 89th Cong., 2d Sess., 9 (1966).

[35] That Members of the House did not consider the new written order clause a significant departure from previous proposals is evident from their specific characterizations of the bill during the brief House debate as legislation designed to provide benefits when persons are displaced by the acquisition of property for public programs. See 116 Cong. Rec. 40167

Nor is there any evidence that the Senate perceived the written order clause as an expansion of the bill when it accepted the House Committee's changes without a conference and almost without debate. 116 Cong. Rec. 40163–40172 (1970). The sole reference during the Senate deliberations to the amended definition of a "displaced person" appeared in a memorandum submitted on behalf of the administration, which stated:

> "The House bill would limit the status of displaced person to those who move as the result of the acquisition of, or written notice to vacate, real property. The Senate version would provide a broader definition which includes those who move as the result of acquisition or reasonable expectation of acquisition." *Id.*, at 42139.

This description of the amendment as a slight limitation, rather than a significant expansion of the statutory design, was accepted without dispute when the Senate approved the House version of this section as the final language for the Relocation Act. *Ibid.*

In sum, the legislative history of the written order clause reveals no congressional intent to extend relocation benefits beyond the acquisition context. Rather, this clause merely ensures that assistance is available for a distinct group of persons directed to move because of a contemplated acquisition, whether the agency ultimately acquires the property or not. The written order clause therefore preserves the original meaning of a displaced person, since it does not apply unless a proposed acquisition directly causes issuance of the notice to vacate and the property acquisition is intended to further a federal program or project.

(1970) (Rep. Edmondson); *id.*, at 40169 (Rep. Cleveland); *id.*, at 40170 (Rep. Johnson); *id.*, at 40171 (Rep. Brotzman); *id.*, at 40171–40172 (Rep. Annunzio). See also *id.*, at 42506 (Rep. Edmondson); *id.*, at 42507 (Rep. Hall).

C

The structure of the Relocation Act confirms our conclusion that Congress did not expect to provide assistance for all persons somehow displaced by Government programs. The benefit provisions involved here are but one part of a comprehensive statute that also establishes the procedures agencies must follow when acquiring land for federal programs. See 42 U. S. C. §§ 4651–4655. This placement in itself suggests that Congress was concerned with burdens related to Government acquisitions of property, as opposed to a broader range of dislocation problems. But more importantly, the Act's other relocation sections, which specify the benefits available for displaced persons, manifest the limited scope of § 101 (6) and the written order clause.

Sections 202 and 205 of the Act require respectively that moving and related expenses be paid and relocation assistance advisory services be provided for displaced persons only when an agency proposes acquiring property for a federal program. See n. 1, *supra*. Thus, § 202 begins:

> "Whenever the acquisition of real property for a program or project undertaken by a Federal agency in any State will result in the displacement of any person . . . the head of such agency shall make a payment to any displaced person, upon proper application . . . ." 84 Stat. 1895, 42 U. S. C. § 4622.

Identical language triggers application of § 205. 84 Stat. 1897, 42 U. S. C. § 4625. If the tenants' broad construction of the written order clause were correct, certain individuals would qualify as displaced persons within the meaning of § 101 (6), but the lack of an acquisition would preclude them from receiving benefits under §§ 202 and 205. Absent any indication that Congress intended such an anomalous result, we believe all three provisions must be given similar scope.[36]

[36] In contrast, §§ 202 and 205 do function properly if the written order

Sections 203 and 204 of the Act, which authorize replacement housing payments for dislocated homeowners and tenants, see n. 1, *supra*, also bear upon interpretation of the written order clause. These sections provide benefits only to displaced persons who occupied their dwelling for a prescribed length of time "prior to the initiation of negotiations for the acquisition of the property." 42 U. S. C. § 4623 (a)(1).[37] Congress drafted these occupancy requirements to exclude from coverage persons who otherwise might attempt to obtain substantial relocation benefits by moving onto property after the acquisition process has begun.[38] Yet according to the tenants' analysis of § 101 (6), which requires only that an agency have procured the property at some point in the distant past, these occupancy strictures would exclude a much larger class of displaced persons than necessary to fulfill their objective. For example, tenants dislocated by the closing of a housing project that an agency had obtained 20 years earlier might satisfy the written order clause, but the failure of most to have lived in the project prior to the acquisition would prevent them from obtaining replacement housing payments under § 204. Again, we doubt Congress intended the statute to operate in this manner. Rather, §§ 203 and 204 demonstrate that the written order clause cannot be divorced from the acquisition context without distorting the statutory design.

Finally, the special benefits provision in § 217 of the Act

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clause is given the construction compelled by its legislative history. When tenants vacate upon notice that an agency will acquire real property, "the acquisition of real property . . . will result in [their] displacement," for purposes of §§ 202 and 205, regardless of whether the agency completes its plans.

[37] Section 204 refers to "such dwelling" instead of "the property." 42 U. S. C. § 4624. The length-of-prior-occupancy requirement is 180 days for displaced homeowners and 90 days for displaced tenants. §§ 4623 (a)(1), 4624.

[38] See S. Rep. No. 91–488, pp. 10–12 (1969); H. R. Rep. No. 91–1656, pp. 8–12 (1970).

highlights the limited reach of § 101 (6). Congress drafted § 217 to preserve the one pre-existing relocation assistance program extending beyond the acquisition context.[39] This section provides:

> "A person who moves . . . as a direct result of any project or program which receives Federal financial assistance under title I of the Housing Act of 1949, as amended, or as a result of carrying out a comprehensive city demonstration program under title I of the Demonstration Cities and Metropolitan Development Act of 1966 shall . . . *be deemed to have been displaced as the result of the acquisition of real property.*" 84 Stat. 1902, 42 U. S. C. § 4637 (emphasis added).

Inclusion of this special provision, to ensure that certain persons displaced by action other than an acquisition of property could still qualify for relocation benefits, reflects Congress' understanding that such persons would not be covered by the general definition of a "displaced person" set forth in § 101 (6).[40]

D

Accordingly, we hold that the written order clause encompasses only those persons ordered to vacate in connection with the actual or proposed acquisition of property for a federal program. In essence, the clause embodies two causal requirements. First, the written order to vacate must result directly from an actual or contemplated property acquisition.[41] Sec-

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[39] See nn. 12 and 20, *supra*.

[40] See H. R. Rep. No. 91–1656, p. 20 (1970) (This section "makes such a person eligible for the full range of relocation benefits provided for displaced persons"); S. Rep. No. 91–488, p. 15 (1969).

[41] Section 101 (6) does not, however, require that an agency anticipate obtaining title to the property. The legislative history demonstrates that Congress focused on the eventual right to use property, not on an agency's mode of procurement. For example, in explaining that benefits would be available for persons displaced by the Post Office Department's frequent

ond, and more fundamentally, that acquisition must be "for," or intended to further, a federal program or project. In combination, these two causal requirements substantially limit applicability of the written order clause, so that persons directed to vacate property for a federal program cannot obtain relocation assistance unless the agency also intended at the time of acquisition to use the property for such a program or project. Thus, a program developed after the agency procures property will not suffice, even though it necessitates displacements, since that program could not have motivated the property acquisition.[42] It remains to be considered, however, whether the relationship between HUD's acquisitions and orders to vacate brings the tenants here within the purview of § 101 (6).

III

The tenants in both cases contend that the acquisitions of Sky Tower and Riverhouse Apartments met these statutory requirements because HUD obtained the property in connection with its mortgage insurance programs. In support of this

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practice of using options and leasebacks in lieu of directly purchasing property for its facilities, the House Committee stated:

"It makes no difference to a person required to move because of the development of a postal facility which method the postal authorities use to obtain the facility, or who acquires the site or holds the fee title to the property. Since the end product is the same, a facility which serves the public and is regarded by the public as a public building, any person so required to move is a displaced person entitled to the benefits of this legislation." H. R. Rep. No. 91–1656, p. 5 (1970).

[42] This, of course, is not to suggest that § 101 (6) would be inapplicable if an agency acquired property for one program, expecting to displace persons, and then ultimately issued orders to vacate for a different program or project. But Congress' intent to provide relocation benefits for persons displaced in that manner does not assist the tenants here, because their eligibility depends primarily on whether HUD acquired Sky Tower and Riverhouse Apartments "for" a federal program or project in the first instance.

contention, they point to Congress' explicit provision for occasional default acquisitions resulting from the mortgage insurance programs of the National Housing Act. Section 207 (k) of that Act expressly authorizes HUD to purchase insured properties at foreclosure sales, and § 207 (*l*) grants HUD wide latitude to rehabilitate and operate property acquired upon default or to transfer the property and recoup the agency's investment. 12 U. S. C. §§ 1713 (k), (*l*). Pursuant to that mandate, HUD has prepared a Property Disposition Handbook—Multi-family Properties, RHM 4315.1 (1971), revised and set forth at 24 CFR Pt. 290 (1978), which requires responsible officials to formulate a disposition program for newly acquired properties.

However, the legislative history of the Relocation Act discussed in Part II, *supra*, demonstrates that the mere anticipation and authorization of default acquisitions in the mortgage insurance programs cannot render these tenants eligible under § 101 (6). By requiring that an acquisition be "for" a federal program or project, Congress intended that the acquisition must further or accomplish a program designed to benefit the public as a whole.[43] Even assuming that the National Housing Act mortgage insurance programs constitute federal "programs or projects," [44] default acquisitions arising out of those pro-

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[43] The parties have disputed whether HUD voluntarily acquired the properties here, and whether an involuntary acquisition can ever satisfy § 101 (6). But to focus on voluntariness oversimplifies application of the statute. Section 101 (6) applies whenever an agency intends to obtain property for use in a federal program, and voluntariness is relevant only to the extent it is probative of the agency's overall purpose in procuring property.

[44] Committee Reports and earlier versions of this bill elaborated on this language, by referring to an acquisition "for a public improvement constructed or developed by or with funds provided in whole or in part by the Federal Government." S. Rep. No. 91–488, p. 9 (1969); accord, S. 1, 91st Cong., 1st Sess., § 110 (1969) (as introduced and reported by Committee).

grams do not satisfy § 101 (6)'s causality requirements. These acquisitions occur as a result of the mortgage insurance programs' predictable, though unfortunate failures, but the default acquisitions do not further the purpose of these particular programs.[45] If the written order clause were satisfied by acquisitions so tangentially related to a federal program or project, then, for example, persons who default on federally insured housing loans presumably could obtain relocation assistance whenever a Government agency acquires their homes at a foreclosure sale and thereby causes displacements. Absent any evidence that Congress intended to provide relocation benefits under such circumstances, we believe typical default acquisitions are not "for" a federal program within the meaning of § 101 (6). For the same reasons, HUD's preparation of a Handbook governing the disposition of property acquired in this manner fails to qualify these tenants for relocation benefits. Like any purchaser, HUD must manage the property it acquires. But the mere adoption of a management plan cannot retroactively establish the requisite purpose for acquiring property in the first instance.

Alternatively, the tenants in No. 77–1463 contend that the particular disposition HUD planned for Sky Tower, pursuant to the Property Disposition Handbook, qualified them under the written order clause. After studying several options, HUD decided to demolish Sky Tower and sell the land to private developers who would build single-family homes, all in accordance with the District of Columbia government's master plan for improving the neighborhood. By its own admission in proceedings before the District Court, HUD proposed the demolition to "eliminate blight" in conformity with a plan to revitalize the area. 396 F. Supp. 1235, 1236 (DC 1975).

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[45] The mortgage insurance programs were intended to facilitate "realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family." 42 U. S. C. §§ 1441, 1441a; accord, 12 U. S. C. § 1701t.

These events convinced the Court of Appeals that the Sky Tower tenants had been ordered to vacate for a "program or project" within the meaning of § 101 (6). 187 U. S. App. D. C., at 161, 571 F. 2d, at 595.

The difficulty with this analysis is that even though HUD's demolition plan is the type of program or project to which § 101 (6) refers, HUD did not *acquire* Sky Tower for that purpose. The statute requires more than a causal connection between the order to vacate and the demolition program, which was all the Court of Appeals considered necessary. As explained in Part II, *supra,* the program or project must also be the reason for acquiring the property. Yet the tenants have never contended that HUD initially acquired Sky Tower in order to eliminate blight or to further the District of Columbia government's master plan, nor did the Court of Appeals or the District Court reach such a conclusion. Without the requisite relationship between the demolition program and the acquisition, HUD's proposal for disposing of Sky Tower is no different than any other property management plan, insufficient by itself to confer eligibility under § 101 (6) of the Relocation Act.

We recognize, of course, that an agency's intent in acquiring property appears irrelevant to those displaced by federal order. From a tenant's perspective, the costs of dislocation are the same regardless of whether an agency anticipated causing displacements when it acquired property. Nonetheless, Congress chose to condition eligibility for relocation benefits on the agency's purpose in acquiring property, and our function is not to rewrite the statute. The increasing number of default acquisitions by Government agencies may well prompt Congress to expand the Relocation Act's coverage.[46] But until

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[46] See Hearings on Distressed HUD-Subsidized Multifamily Housing Projects before the Senate Committee on Banking, Housing, and Urban Affairs, 95th Cong., 1st Sess., 134–135, 250–253 (1977) (statement of Lawrence B. Simons, Assistant Secretary of HUD).

Congress does so, the tenants in these cases are ineligible for relocation assistance under that Act.

Accordingly, the judgment of the Court of Appeals in No. 77–1463 is reversed and the judgment in No. 77–874 is affirmed.

It is so ordered.

AMBACH, COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK, ET AL. *v.* NORWICK ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 76-808. Argued January 10, 1979—Decided April 17, 1979

Held: A New York statute forbidding permanent certification as a public school teacher of any person who is not a United States citizen unless that person has manifested an intention to apply for citizenship, does not violate the Equal Protection Clause of the Fourteenth Amendment. Pp. 72–81.

(a) As a general principle some state functions are so bound up with the operation of the State as a governmental entity as to permit exclusion from those functions of all persons who have not become part of the process of self-government. Accordingly, a State is required to justify its exclusion of aliens from such governmental positions only "by a showing of some rational relationship between the interest sought to be protected and the limiting classification." *Foley* v. *Connelie,* 435 U. S. 291, 296. Pp. 73–74.

(b) This rule for governmental functions, which is an exception to the stricter general standard applicable to classifications based on alienage, rests on important principles inherent in the Constitution. The distinction between citizens and aliens, though ordinarily irrelevant to private activity, is fundamental to the definition and government of a State, and the references to such distinction in the Constitution itself indicate that the status of citizenship was meant to have significance in the structure of our government. It is because of this special significance of citizenship that governmental entities, when exercising the functions of government, have wider latitude in limiting the participation of noncitizens. P. 75.

(c) Taking into consideration the role of public education and the degree of responsibility and discretion teachers possess in fulfilling that role, it is clear that public school teachers come well within the "governmental function" principle recognized in *Sugarman* v. *Dougall,* 413 U. S. 634, and *Foley* v. *Connelie, supra,* and, accordingly, the Constitution requires only that a citizenship requirement applicable to teaching in the public school bear a rational relationship to a legitimate state interest. Pp. 75–80.

(d) Here, the statute in question does bear a rational relationship to the State's interest in furthering its educational goals, especially with respect to regarding all teachers as having an obligation to promote civic virtues and understanding in their classes, regardless of the subject taught. Pp. 80–81.

417 F. Supp. 913, reversed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, and REHNQUIST, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and STEVENS, JJ., joined, *post*, p. 81.

Judith A. Gordon, Assistant Attorney General of New York, argued the cause for appellants. With her on the briefs were *Robert Abrams*, Attorney General, *Louis J. Lefkowitz*, former Attorney General, *Samuel A. Hirshowitz*, First Assistant Attorney General, and *George D. Zuckerman*, Assistant Solicitor General.

Bruce J. Ennis, Jr., argued the cause for appellees. With him on the brief were *David Carliner* and *Burt Neuborne*.*

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents the question whether a State, consistently with the Equal Protection Clause of the Fourteenth Amendment, may refuse to employ as elementary and secondary school teachers aliens who are eligible for United States citizenship but who refuse to seek naturalization.

I

New York Education Law § 3001 (3) (McKinney 1970) forbids certification as a public school teacher of any person who is not a citizen of the United States, unless that person has

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**Albert E. Arent, Vilma S. Martinez, Peter Roos*, and *Roderic V. O. Boggs* filed a brief for the Washington Lawyers' Committee for Civil Rights Under Law et al. as *amici curiae* urging affirmance.

manifested an intention to apply for citizenship.[1] The Commissioner of Education is authorized to create exemptions from this prohibition, and has done so with respect to aliens who are not yet eligible for citizenship.[2] Unless a teacher obtains certification, he may not work in a public elementary or secondary school in New York.[3]

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[1] The statute provides:

"No person shall be employed or authorized to teach in the public schools of the state who is:

. . . . . .

"3. Not a citizen. The provisions of this subdivision shall not apply, however, to an alien teacher now or hereafter employed, provided such teacher shall make due application to become a citizen and thereafter within the time prescribed by law shall become a citizen. The provisions of this subdivision shall not apply after July first, nineteen hundred sixty-seven, to an alien teacher employed pursuant to regulations adopted by the commissioner of education permitting such employment." N. Y. Educ. Law § 3001 (3) (McKinney 1970).

The statute contains an exception for persons who are ineligible for United States citizenship solely because of an oversubscribed quota. § 3001–a (McKinney 1970). Because this statutory provision is in all respects narrower than the exception provided by regulation, see n. 2, *infra*, as a practical matter it has no effect.

The State does not certify the qualifications of teachers in the private schools, although it does require that such teachers be "competent." N. Y. Educ. Law § 3204 (2) (McKinney Supp. 1978–1979). Accordingly, we are not presented with the question of, and express no view as to, the permissibility of a citizenship requirement pertaining to teachers in private schools.

[2] The following regulation governs here:

"*Citizenship.* A teacher who is not a citizen of the United States or who has not declared intention of becoming a citizen may be issued a provisional certificate providing such teacher has the appropriate educational qualifications as defined in the regulations and (1) possesses skills or competencies not readily available among teachers holding citizenship, or (2) is unable to declare intention of becoming a citizen for valid statutory reasons." 8 N. Y. C. R. R. § 80.2 (i) (1978).

[3] Certification by the Commissioner of Education is not required of teachers at state institutions of higher education and the citizenship

Appellee Norwick was born in Scotland and is a subject of Great Britain. She has resided in this country since 1965 and is married to a United States citizen. Appellee Dachinger is a Finnish subject who came to this country in 1966 and also is married to a United States citizen. Both Norwick and Dachinger currently meet all of the educational requirements New York has set for certification as a public school teacher, but they consistently have refused to seek citizenship in spite of their eligibility to do so. Norwick applied in 1973 for a teaching certificate covering nursery school through sixth grade, and Dachinger sought a certificate covering the same grades in 1975.[4] Both applications were denied because of appellees' failure to meet the requirements of § 3001 (3). Norwick then filed this suit seeking to enjoin the enforcement of § 3001 (3), and Dachinger obtained leave to intervene as a plaintiff.

A three-judge District Court was convened pursuant to 28 U. S. C. § 2281 (1970 ed.). Applying the "close judicial scrutiny" standard of *Graham* v. *Richardson*, 403 U. S. 365, 372 (1971), the court held that § 3001 (3) discriminated against aliens in violation of the Equal Protection Clause. *Norwick* v. *Nyquist*, 417 F. Supp. 913 (SDNY 1976). The court believed that the statute was overbroad, because it excluded all resident aliens from all teaching jobs regardless of the subject sought to be taught, the alien's nationality, the nature of the

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restriction accordingly does not apply to them. Brief for Appellants 13 n. *.

[4] At the time of her application Norwick had not yet met the post-graduate educational requirements for a permanent certificate and accordingly applied only for a temporary certificate, which also is governed by § 3001 (3). She since has obtained the necessary graduate degree for full certification. Dachinger previously had obtained a temporary certificate, which had lapsed at the time of her 1975 application. The record does not indicate whether Dachinger previously had declared an intent to obtain citizenship or had obtained the temporary certificate because of some applicable exception to the citizenship requirement.

alien's relationship to this country, and the alien's willingness to substitute some other sign of loyalty to this Nation's political values, such as an oath of allegiance. *Id.*, at 921. We noted probable jurisdiction over the state school officials' appeal, 436 U. S. 902 (1978), and now reverse.

II

A

The decisions of this Court regarding the permissibility of statutory classifications involving aliens have not formed an unwavering line over the years. State regulation of the employment of aliens long has been subject to constitutional constraints. In *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886), the Court struck down an ordinance which was applied to prevent aliens from running laundries, and in *Truax* v. *Raich*, 239 U. S. 33 (1915), a law requiring at least 80% of the employees of certain businesses to be citizens was held to be an unconstitutional infringement of an alien's "right to work for a living in the common occupations of the community . . . ." *Id.*, at 41. At the same time, however, the Court also has recognized a greater degree of latitude for the States when aliens were sought to be excluded from public employment. At the time *Truax* was decided, the governing doctrine permitted States to exclude aliens from various activities when the restriction pertained to "the regulation or distribution of the public domain, or of the common property or resources of the people of the State . . . ." *Id.*, at 39. Hence, as part of a larger authority to forbid aliens from owning land, *Frick* v. *Webb*, 263 U. S. 326 (1923); *Webb* v. *O'Brien*, 263 U. S. 313 (1923); *Porterfield* v. *Webb*, 263 U. S. 225 (1923); *Terrace* v. *Thompson*, 263 U. S. 197 (1923); *Blythe* v. *Hinckley*, 180 U. S. 333 (1901); *Hauenstein* v. *Lynham*, 100 U. S. 483 (1880); harvesting wildlife, *Patsone* v. *Pennsylvania*, 232 U. S. 138 (1914); *McCready* v. *Virginia*, 94 U. S. 391 (1877);

or maintaining an inherently dangerous enterprise, *Ohio ex rel. Clarke* v. *Deckebach*, 274 U. S. 392 (1927), States permissibly could exclude aliens from working on public construction projects, *Crane* v. *New York*, 239 U. S. 195 (1915), and, it appears, from engaging in any form of public employment at all, see *Truax, supra*, at 40.

Over time, the Court's decisions gradually have restricted the activities from which States are free to exclude aliens. The first sign that the Court would question the constitutionality of discrimination against aliens even in areas affected with a "public interest" appeared in *Oyama* v. *California*, 332 U. S. 633 (1948). The Court there held that statutory presumptions designed to discourage evasion of California's ban on alien landholding discriminated against the citizen children of aliens. The same Term, the Court held that the "ownership" a State exercises over fish found in its territorial waters "is inadequate to justify California in excluding any or all aliens who are lawful residents of the State from making a living by fishing in the ocean off its shores while permitting all others to do so." *Takahashi* v. *Fish & Game Comm'n*, 334 U. S. 410, 421 (1948). This process of withdrawal from the former doctrine culminated in *Graham* v. *Richardson, supra*, which for the first time treated classifications based on alienage as "inherently suspect and subject to close judicial scrutiny." 403 U. S., at 372. Applying *Graham*, this Court has held invalid statutes that prevented aliens from entering a State's classified civil service, *Sugarman* v. *Dougall*, 413 U. S. 634 (1973), practicing law, *In re Griffiths*, 413 U. S. 717 (1973), working as an engineer, *Examining Board* v. *Flores de Otero*, 426 U. S. 572 (1976), and receiving state educational benefits, *Nyquist* v. *Mauclet*, 432 U. S. 1 (1977).

Although our more recent decisions have departed substantially from the public-interest doctrine of *Truax*'s day, they have not abandoned the general principle that some state functions are so bound up with the operation of the State as

a governmental entity as to permit the exclusion from those functions of all persons who have not become part of the process of self-government. In *Sugarman*, we recognized that a State could, "in an appropriately defined class of positions, require citizenship as a qualification for office." We went on to observe:

> "Such power inheres in the State by virtue of its obligation, already noted above, 'to preserve the basic conception of a political community.' . . . And this power and responsibility of the State applies, not only to the qualifications of voters, but also to persons holding state elective or important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government." 413 U. S., at 647 (citation omitted).

The exclusion of aliens from such governmental positions would not invite as demanding scrutiny from this Court. *Id.*, at 648. See also *Nyquist* v. *Mauclet*, *supra*, at 11; *Perkins* v. *Smith*, 370 F. Supp. 134 (Md. 1974), summarily aff'd, 426 U. S. 913 (1976).

Applying the rational-basis standard, we held last Term that New York could exclude aliens from the ranks of its police force. *Foley* v. *Connelie*, 435 U. S. 291 (1978). Because the police function fulfilled "a most fundamental obligation of government to its constituency" and by necessity cloaked policemen with substantial discretionary powers, we viewed the police force as being one of those appropriately defined classes of positions for which a citizenship requirement could be imposed. *Id.*, at 297. Accordingly, the State was required to justify its classification only "by a showing of some rational relationship between the interest sought to be protected and the limiting classification." *Id.*, at 296.

The rule for governmental functions, which is an exception to the general standard applicable to classifications based on alienage, rests on important principles inherent in the Constitution. The distinction between citizens and aliens, though ordinarily irrelevant to private activity, is fundamental to the definition and government of a State. The Constitution itself refers to the distinction no less than 11 times, see *Sugarman* v. *Dougall, supra,* at 651–652 (REHNQUIST, J., dissenting), indicating that the status of citizenship was meant to have significance in the structure of our government. The assumption of that status, whether by birth or naturalization, denotes an association with the polity which, in a democratic republic, exercises the powers of governance. See *Foley* v. *Connelie, supra,* at 295. The form of this association is important: an oath of allegiance or similar ceremony cannot substitute for the unequivocal legal bond citizenship represents. It is because of this special significance of citizenship that governmental entities, when exercising the functions of government, have wider latitude in limiting the participation of noncitizens.[5]

B

In determining whether, for purposes of equal protection analysis, teaching in public schools constitutes a governmental function, we look to the role of public education and to the degree of responsibility and discretion teachers possess in fulfilling that role. See *Foley* v. *Connelie, supra,* at 297. Each of these considerations supports the conclusion that public school teachers may be regarded as performing a task "that

[5] That the significance of citizenship has constitutional dimensions also has been recognized by several of our decisions. In *Trop* v. *Dulles,* 356 U. S. 86 (1958), a plurality of the Court held that the expatriation of an American citizen constituted cruel and unusual punishment for the crime of desertion in time of war. In *Afroyim* v. *Rusk,* 387 U. S. 253 (1967), the Court held that the Constitution forbade Congress from depriving a person of his citizenship against his will for any reason.

go[es] to the heart of representative government." *Sugarman* v. *Dougall, supra,* at 647.[6]

Public education, like the police function, "fulfills a most fundamental obligation of government to its constituency." *Foley, supra,* at 297. The importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, long has been recognized by our decisions:

> "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education

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[6] The dissenting opinion of MR. JUSTICE BLACKMUN, in reaching an opposite conclusion, appears to apply a different analysis from that employed in our prior decisions. Rather than considering whether public school teachers perform a significant government function, the inquiry mandated by *Foley v. Connelie,* 435 U. S. 291 (1978), and *Sugarman* v. *Dougall,* the dissent focuses instead on the general societal importance of primary and secondary school teachers both public and private. Thus, the dissent on the one hand depreciates the importance of New York's citizenship requirement because it is not applied to private school teachers, and on the other hand argues that the role teachers perform in our society is no more significant than that filled by attorneys. This misses the point of *Foley* and *Sugarman.* New York's citizenship requirement is limited to a governmental function because it applies only to teachers employed by and acting as agents of the State. The Connecticut statute held unconstitutional in *In re Griffiths,* 413 U. S. 717 (1973), by contrast, applied to all attorneys, most of whom do not work for the government. The exclusion of aliens from access to the bar implicated the right to pursue a chosen occupation, not access to public employment. Cf. *Nyquist* v. *Mauclet,* 432 U. S. 1, 15–16, n. (1977) (POWELL, J., dissenting). The distinction between a private occupation and a government function was noted expressly in *Griffiths:*

"Lawyers do indeed occupy professional positions of responsibility and influence that impose on them duties correlative with their vital right of access to the courts. Moreover, by virtue of their professional aptitudes and natural interests, lawyers have been leaders in government throughout the history of our country. Yet, they are not officials of government by virtue of being lawyers." 413 U. S., at 729.

> both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Brown* v. *Board of Education*, 347 U. S. 483, 493 (1954).

See also *Keyes* v. *School Dist. No. 1, Denver, Colo.*, 413 U. S. 189, 246 (1973) (POWELL, J., concurring in part and dissenting in part); *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S. 1, 29–30 (1973); *Wisconsin* v. *Yoder*, 406 U. S. 205, 213 (1972); *id.*, at 238–239 (WHITE, J., concurring); *Abington School Dist.* v. *Schempp*, 374 U. S. 203, 230 (1963) (BRENNAN, J., concurring); *Adler* v. *Board of Education*, 342 U. S. 485, 493 (1952); *McCollum* v. *Board of Education*, 333 U. S. 203, 212 (1948) (opinion of Frankfurter, J.); *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925); *Meyer* v. *Nebraska*, 262 U. S. 390 (1923); *Interstate Consolidated Street R. Co.* v. *Massachusetts*, 207 U. S. 79 (1907).[7] Other authorities have perceived public schools as an "assimilative force" by which diverse and conflicting elements in our society are brought together on a broad but common ground. See, *e. g.*, J. Dewey, Democracy and Education 26 (1929); N. Edwards & H. Richey, The School in the American Social Order 623–624 (2d ed. 1963). These perceptions of the public schools as inculcating fundamental values necessary to the maintenance of a democratic political system have been confirmed by the observations of social scientists. See R. Daw-

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[7] As *San Antonio Independent School Dist.* v. *Rodriguez* recognized, there is no inconsistency between our recognition of the vital significance of public education and our holding that access to education is not guaranteed by the Constitution. 411 U. S., at 30–35.

son & K. Prewitt, Political Socialization 146–167 (1969); R. Hess & J. Torney, The Development of Political Attitudes in Children 114, 158–171, 217–220 (1967); V. Key, Public Opinion and American Democracy 323–343 (1961).[8]

Within the public school system, teachers play a critical part in developing students' attitude toward government and understanding of the role of citizens in our society. Alone among employees of the system, teachers are in direct, day-to-day contact with students both in the classrooms and in the other varied activities of a modern school. In shaping the students' experience to achieve educational goals, teachers by necessity have wide discretion over the way the course material is communicated to students. They are responsible for presenting and explaining the subject matter in a way that is both comprehensible and inspiring. No amount of standardization of teaching materials or lesson plans can eliminate the personal qualities a teacher brings to bear in achieving these goals. Further, a teacher serves as a role model for his students, exerting a subtle but important influence over their

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[8] The curricular requirements of New York's public school system reflect some of the ways a public school system promotes the development of the understanding that is prerequisite to intelligent participation in the democratic process. The schools are required to provide instruction "to promote a spirit of patriotic and civic service and obligation and to foster in the children of the state moral and intellectual qualities which are essential in preparing to meet the obligations of citizenship in peace or in war . . . ." N. Y. Educ. Law § 801 (1) (McKinney 1969). Flag and other patriotic exercises also are prescribed, as loyalty is a characteristic of citizenship essential to the preservation of a country. § 802 (McKinney 1969 and Supp. 1978–1979). In addition, required courses include classes in civics, United States and New York history, and principles of American government. §§ 3204 (3)(a)(1), (2) (McKinney 1970).

Although private schools also are bound by most of these requirements, the State has a stronger interest in ensuring that the schools it most directly controls, and for which it bears the cost, are as effective as possible in teaching these courses.

perceptions and values. Thus, through both the presentation of course materials and the example he sets, a teacher has an opportunity to influence the attitudes of students toward government, the political process, and a citizen's social responsibilities.[9] This influence is crucial to the continued good health of a democracy.[10]

Furthermore, it is clear that all public school teachers, and not just those responsible for teaching the courses most directly related to government, history, and civic duties, should

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[9] Although the findings of scholars who have written on the subject are not conclusive, they generally reinforce the common-sense judgment, and the experience of most of us, that a teacher exerts considerable influence over the development of fundamental social attitudes in students, including those attitudes which in the broadest sense of the term may be viewed as political. See, *e. g.*, R. Dawson & K. Prewitt, Political Socialization 158–167 (1969); R. Hess & J. Torney, The Development of Political Attitudes in Children 162–163, 217–218 (1967). Cf. Note, Aliens' Right to Teach: Political Socialization and the Public Schools, 85 Yale L. J. 90, 99–104 (1975).

[10] Appellees contend that restriction of an alien's freedom to teach in public schools is contrary to principles of diversity of thought and academic freedom embodied in the First Amendment. See also *id.*, at 106–109. We think that the attempt to draw an analogy between choice of citizenship and political expression or freedom of association is wide of the mark, as the argument would bar any effort by the State to promote particular values and attitudes toward government. Section 3001 (3) does not inhibit appellees from expressing freely their political or social views or from associating with whomever they please. Cf. *Givhan* v. *Western Line Consol. School Dist.*, 439 U. S. 410, 415–416 (1979); *Mt. Healthy City Board of Education* v. *Doyle*, 429 U. S. 274 (1977); *Pickering* v. *Board of Education*, 391 U. S. 563 (1968). Nor are appellees discouraged from joining with others to advance particular political ends. Cf. *Shelton* v. *Tucker*, 364 U. S. 479 (1960). The only asserted liberty of appellees withheld by the New York statute is the opportunity to teach in the State's schools so long as they elect not to become citizens of this country. This is not a liberty that is accorded constitutional protection.

help fulfill the broader function of the public school system.[11] Teachers, regardless of their specialty, may be called upon to teach other subjects, including those expressly dedicated to political and social subjects.[12] More importantly, a State properly may regard all teachers as having an obligation to promote civic virtues and understanding in their classes, regardless of the subject taught. Certainly a State also may take account of a teacher's function as an example for students, which exists independently of particular classroom subjects. In light of the foregoing considerations, we think it clear that public school teachers come well within the "governmental function" principle recognized in *Sugarman* and *Foley*. Accordingly, the Constitution requires only that a citizenship requirement applicable to teaching in the public schools bear a rational relationship to a legitimate state interest. See *Massachusetts Board of Retirement* v. *Murgia*, 427 U. S. 307, 314 (1976).

III

As the legitimacy of the State's interest in furthering the educational goals outlined above is undoubted, it remains only to consider whether § 3001 (3) bears a rational relationship to this interest. The restriction is carefully framed to serve its purpose, as it bars from teaching only those aliens who have demonstrated their unwillingness to obtain United States citizenship.[13] Appellees, and aliens similarly situated, in effect have chosen to classify themselves. They prefer to retain citizenship in a foreign country with the obligations it entails

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[11] At the primary school level, for which both appellees sought certification, teachers are responsible for all of the basic curriculum.

[12] In New York, for example, all certified teachers, including those in the secondary schools, are required to be available for up to five hours of teaching a week in subjects outside their specialty. 8 N. Y. C. R. R. § 80.2 (c) (1978).

[13] See n. 2, *supra*.

of primary duty and loyalty.[14] They have rejected the open invitation extended to qualify for eligibility to teach by applying for citizenship in this country. The people of New York, acting through their elected representatives, have made a judgment that citizenship should be a qualification for teaching the young of the State in the public schools, and § 3001 (3) furthers that judgment.[15]

Reversed.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and MR. JUSTICE STEVENS join, dissenting.

Once again the Court is asked to rule upon the constitutionality of one of New York's many statutes that impose a

[14] As our cases have emphasized, resident aliens pay taxes, serve in the Armed Forces, and have made significant contributions to our country in private and public endeavors. See *In re Griffiths*, 413 U. S., at 722; *Sugarman* v. *Dougall*, 413 U. S., at 645; *Graham* v. *Richardson*, 403 U. S. 365, 376 (1971). No doubt many of them, and we do not exclude appellees, would make excellent public school teachers. But the legislature, having in mind the importance of education to state and local governments, see *Brown* v. *Board of Education*, 347 U. S. 483, 493 (1954), may determine eligibility for the key position in discharging that function on the assumption that *generally* persons who are citizens, or who have not declined the opportunity to seek United States citizenship, are better qualified than are those who have elected to remain aliens. We note in this connection that regulations promulgated pursuant to § 3001 (3) do provide for situations where a particular alien's special qualifications as a teacher outweigh the policy primarily served by the statute. See 8 N. Y. C. R. R. § 80.2 (i)(1) (1978). The appellants inform us, however, that the authority conferred by this regulation has not been exercised. Brief for Appellants 7 n. *.

[15] Appellees argue that the State cannot rationally exclude aliens from teaching positions and yet permit them to vote for and sit on certain local school boards. We note, first, that the State's legislature has not expressly endorsed this policy. Rather, appellants as an administrative matter have interpreted the statute governing New York City's unique community school boards, N. Y. Educ. Law § 2590–c (4) (McKinney Supp. 1978–1979), to permit aliens who are the parents of public school students

requirement of citizenship upon a person before that person may earn his living in a specified occupation.[1] These New York statutes, for the most part, have their origin in the frantic and overreactive days of the First World War when attitudes of parochialism and fear of the foreigner were the order of the day. This time we are concerned with the right to teach in the public schools of the State, at the elementary and secondary levels, and with the citizenship requirement that N. Y. Educ. Law § 3001 (3) (McKinney 1970), quoted by the Court, *ante*, at 70 n. 1, imposes.[2]

As the Court acknowledges, *ante*, at 72, its decisions regarding the permissibility of statutory classifications concerning aliens "have not formed an unwavering line over the years."[3] Thus, just last Term, in *Foley* v. *Connelie*, 435 U. S. 291 (1978), the Court upheld against equal protection challenge the New York statute limiting appointment of members of the state police force to citizens of the United States. The touchstone, the Court indicated, was that citizenship may be

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to participate in these boards. See App. 27, 29. We also may assume, without having to decide, that there is a rational basis for a distinction between teachers and board members based on their respective responsibilities. Although possessing substantial responsibility for the administration of the schools, board members teach no classes, and rarely if ever are known or identified by the students.

[1] One of the appellees in *Nyquist* v. *Mauclet*, 432 U. S. 1 (1977), submitted a list of the New York statutes that required citizenship, or a declaration of intent to become a citizen, for no fewer than 37 occupations. Brief for Appellee Mauclet, O. T. 1976, No. 76–208, pp. 19–22, nn. 8–44, inclusive. Some of those statutes have been legislatively repealed or modified, or judicially invalidated. Others are still in effect. Among the latter are those relating to the occupations of inspector, certified shorthand reporter, funeral director, masseur, physical therapist, and animal technician.

[2] This particular citizenship requirement had its origin in 1918 N. Y. Laws, ch. 158, effective Apr. 4, 1918.

[3] "To be sure, the course of decisions protecting the employment rights of resident aliens has not been an unswerving one." *In re Griffiths*, 413 U. S. 717, 720 (1973).

a relevant qualification for fulfilling " 'important nonelective executive, legislative, and judicial positions' held by 'officers who participate directly in the formulation, execution, or review of broad public policy.' " *Id.*, at 296, quoting *Sugarman* v. *Dougall*, 413 U. S. 634, 647 (1973). For such positions, a State need show only some rational relationship between the interest sought to be protected and the limiting classification. Police, it then was felt, were clothed with authority to exercise an almost infinite variety of discretionary powers that could seriously affect members of the public. 435 U. S., at 297. They thus fell within the category of important officers who participate directly in the execution of "broad public policy." The Court was persuaded that citizenship bore a rational relationship to the special demands of police positions, and that a State therefore could constitutionally confine that public responsibility to citizens of the United States. *Id.*, at 300. The propriety of making citizenship a qualification for a narrowly defined class of positions was also recognized, in passing, in *Sugarman* v. *Dougall*, 413 U. S., at 647, and in *Nyquist* v. *Mauclet*, 432 U. S. 1, 11 (1977).

On the other hand, the Court frequently has invalidated a state provision that denies a resident alien the right to engage in specified occupational activity: *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886) (ordinance applied so as to prevent Chinese subjects from engaging in the laundry business); *Truax* v. *Raich*, 239 U. S. 33 (1915) (statute requiring an employer's work force to be composed of not less than 80% "qualified electors or native-born citizens"); *Takahashi* v. *Fish & Game Comm'n*, 334 U. S. 410 (1948) (limitation of commercial fishing licenses to persons not "ineligible to citizenship"); *Sugarman* v. *Dougall*, *supra* (New York statute relating to permanent positions in the "competitive class" of the state civil service); *In re Griffiths*, 413 U. S. 717 (1973) (the practice of law); *Nelson* v. *Miranda*, 413 U. S. 902 (1973), summarily aff'g 351 F. Supp. 735 (Ariz. 1972) (social service worker

and teacher); *Examining Board* v. *Flores de Otero*, 426 U. S. 572 (1976) (the practice of civil engineering). See also *Nyquist* v. *Mauclet*, *supra* (New York statute barring certain resident aliens from state financial assistance for higher education).

Indeed, the Court has held more than once that state classifications based on alienage are "inherently suspect and subject to close judicial scrutiny." *Graham* v. *Richardson*, 403 U. S. 365, 372 (1971). See *Examining Board* v. *Flores de Otero*, 426 U. S., at 601–602; *In re Griffiths*, 413 U. S., at 721; *Sugarman* v. *Dougall*, 413 U. S., at 642; *Nyquist* v. *Mauclet*, 432 U. S., at 7. And "[a]lienage classifications by a State that do not withstand this stringent examination cannot stand." *Ibid.*

There is thus a line, most recently recognized in *Foley* v. *Connelie*, between those employments that a State in its wisdom constitutionally may restrict to United States citizens, on the one hand, and those employments, on the other, that the State may not deny to resident aliens. For me, the present case falls on the *Sugarman-Griffiths-Flores de Otero-Mauclet* side of that line, rather than on the narrowly isolated *Foley* side.

We are concerned here with elementary and secondary education in the public schools of New York State. We are not concerned with teaching at the college or graduate levels. It seems constitutionally absurd, to say the least, that in these lower levels of public education a Frenchman may not teach French or, indeed, an Englishwoman may not teach the grammar of the English language. The appellees, to be sure, are resident "aliens" in the technical sense, but there is not a word in the record that either appellee does not have roots in this country or is unqualified in any way, other than the imposed requirement of citizenship, to teach. Both appellee Norwick and appellee Dachinger have been in this country for

over 12 years. Each is married to a United States citizen. Each currently meets all the requirements, other than citizenship, that New York has specified for certification as a public school teacher. Tr. of Oral Arg. 4.[4] Each is willing, if required, to subscribe to an oath to support the Constitutions of the United States and of New York.[5] Each lives in an American community, must obey its laws, and must pay all of the taxes citizens are obligated to pay. Appellees, however, have hesitated to give up their respective British and Finnish citizenships, just as lawyer Fre Le Poole Griffiths, the subject of *In re Griffiths, supra,* hesitated to renounce her Netherlands citizenship, although married to a citizen of the United States and a resident of Connecticut.

But the Court, to the disadvantage of appellees, crosses the line from *Griffiths* to *Foley* by saying, *ante,* at 75, that the "distinction between citizens and aliens, though ordinarily irrelevant to private activity, is fundamental to the definition and government of a State." It then concludes that public school teaching "constitutes a governmental function," *ibid.,* and that public school teachers may be regarded as performing a task that goes "to the heart of representative government." *Ante,* at 76. The Court speaks of the importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which

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[4] Appellee Norwick is a *summa cum laude* graduate of a Massachusetts college and received an A average in full-time graduate work in the State University of New York at Albany. She has taught both in this country and in Great Britain.

Appellee Dachinger is a *cum laude* graduate, with a major in German, of Lehman College, a unit of the City University of New York, and possesses a master's degree in Early Childhood Education from that institution. She has taught at a day-care center in the Bronx.

Each appellee, thus, has received and excelled in educational training the State of New York itself offers.

[5] See *In re Griffiths,* 413 U. S., at 726 n. 18.

our society rests.[6] After then observing that teachers play a critical part in all this, the Court holds that New York's citizenship requirement is constitutional because it bears a rational relationship to the State's interest in furthering these educational goals.

I perceive a number of difficulties along the easy road the Court takes to this conclusion:

First, the New York statutory structure itself refutes the argument. Section 3001 (3), the very statute at issue here, provides for exceptions with respect to alien teachers "employed pursuant to regulations adopted by the commissioner of education permitting such employment." Section 3001–a (McKinney 1970) provides another exception for persons ineligible for United States citizenship because of oversubscribed quotas. Also, New York is unconcerned with any citizenship qualification for teachers in the private schools of the State, even though the record indicates that about 18% of the pupils at the elementary and secondary levels attend private schools. The education of those pupils seems not to be inculcated with something less than what is desirable for citizenship and what the Court calls an influence "crucial to the continued good health of a democracy." *Ante*, at 79. The State apparently, under § 3001 (3), would not hesitate to employ an alien teacher while he waits to attain citizenship, even though he may fail ever to attain it. And the stark fact that the State permits some aliens to sit on certain local school boards, N. Y. Educ. Law § 2590–c (4) (McKinney Supp. 1978–1979), reveals how shallow and indistinct is New York's line of demarcation between citizenship and noncitizenship. The Court's at-

[6] One, of course, can agree with this observation. One may concede, also, that public schools are an " 'assimilative force' by which diverse and conflicting elements in our society are brought together on a broad but common ground," *ante*, at 77, and that the inculcation of fundamental values by our public schools is necessary to the maintenance of a democratic political system.

tempted rationalization of this fact, *ante*, at 81–82, n. 15, hardly extinguishes the influence school board members, including these otherwise "disqualified" resident aliens, possess in school administration, in the selection of faculty, and in the approval of textbooks and instructional materials.

Second, the New York statute is all-inclusive in its disqualifying provisions: "No person shall be employed or authorized to teach in the public schools of the state who is . . . [n]ot a citizen." It sweeps indiscriminately. It is "neither narrowly confined nor precise in its application," nor limited to the accomplishment of substantial state interests. *Sugarman* v. *Dougall*, 413 U. S., at 643. See Note, Aliens' Right to Teach: Political Socialization and the Public Schools, 85 Yale L. J. 90, 109–111 (1975).

Third, the New York classification is irrational. Is it better to employ a poor citizen teacher than an excellent resident alien teacher? Is it preferable to have a citizen who has never seen Spain or a Latin American country teach Spanish to eighth graders and to deny that opportunity to a resident alien who may have lived for 20 years in the culture of Spain or Latin America? The State will know how to select its teachers responsibly, wholly apart from citizenship, and can do so selectively and intelligently.[7] That is the way to

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[7] In *In re Griffiths* the Court significantly has observed:

"Connecticut has wide freedom to gauge on a case-by-case basis the fitness of an applicant to practice law. Connecticut can, and does, require appropriate training and familiarity with Connecticut law. Apart from such tests of competence, it requires a new lawyer to take both an 'attorney's oath' to perform his functions faithfully and honestly and a 'commissioner's oath' to 'support the constitution of the United States, and the constitution of the state of Connecticut.' Appellant has indicated her willingness and ability to subscribe to the substance of both oaths, and Connecticut may quite properly conduct a character investigation to insure in any given case 'that an applicant is not one who "swears to an oath *pro forma* while declaring or manifesting his disagreement with or indifference to the oath." *Bond* v. *Floyd*, 385 U. S. 116, 132.' *Law Students*

accomplish the desired result. An artificial citizenship bar is not a rational way. It is, instead, a stultifying provision. The route to "diverse and conflicting elements" and their being "brought together on a broad but common ground," which the Court so emphasizes, *ante*, at 77, is hardly to be achieved by disregarding some of the diverse elements that are available, competent, and contributory to the richness of our society and of the education it could provide.

Fourth, it is logically impossible to differentiate between this case concerning teachers and *In re Griffiths* concerning attorneys. If a resident alien *may not* constitutionally be barred from taking a state bar examination and thereby becoming qualified to practice law in the courts of a State, how is one to comprehend why a resident alien *may* constitutionally be barred from teaching in the elementary and secondary levels of a State's public schools? One may speak proudly of the role model of the teacher, of his ability to mold young minds, of his inculcating force as to national ideals, and of his profound influence in the impartation of our society's values. Are the attributes of an attorney any the less? He represents us in our critical courtroom controversies even when citizenship and loyalty may be questioned. He stands as an officer of every court in which he practices. He is responsible for strict adherence to the announced and implied standards of professional conduct and to the requirements of evolving ethical codes, and for honesty and integrity in his professional

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Research Council v. *Wadmond*, 401 U. S., at 164. Moreover, once admitted to the bar, lawyers are subject to continuing scrutiny by the organized bar and the courts. In addition to discipline for unprofessional conduct, the range of post-admission sanctions extends from judgments for contempt to criminal prosecutions and disbarment. In sum, the Committee simply has not established that it must exclude all aliens from the practice of law in order to vindicate its undoubted interest in high professional standards." 413 U. S., at 725–727 (footnotes omitted).

and personal life. Despite the almost continuous criticism leveled at the legal profession, he, too, is an influence in legislation, in the community, and in the role-model figure that the professional person enjoys.[8] The Court specifically recognized this in *In re Griffiths:*

> "Lawyers do indeed occupy professional positions of responsibility and influence that impose on them duties correlative with their vital right of access to the courts. Moreover, by virtue of their professional aptitudes and natural interests, lawyers have been leaders in government throughout the history of our country." 413 U. S., at 729.[9]

If an attorney has a constitutional right to take a bar examination and practice law, despite his being a resident alien, it is impossible for me to see why a resident alien, otherwise completely competent and qualified, as these appellees concededly are, is constitutionally disqualified from teaching in the public schools of the great State of New York. The

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[8] See also *Stockton* v. *Ford*, 11 How. 232, 247 (1851); *Hickman* v. *Taylor*, 329 U. S. 495, 514–515 (1947) (concurring opinion); *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 247 (1957) (concurring opinion); *In re Sawyer*, 360 U. S. 622, 668 (1959) (dissenting opinion); J. Story, Miscellaneous Writings, Value and Importance of Legal Studies 503–549 (W. Story ed. 1972); Stone, The Public Influence of the Bar, 48 Harv. L. Rev. 1 (1934); W. Brennan, The Responsibilities of the Legal Profession, Address before the Law School of Harvard University (1967); A. de Tocqueville, Democracy in America 321–331 (Schocken ed. 1961); J. Rogers, The Lawyer in American Public Life, in Morrison Foundation Lectures 41, 61 (1940).

[9] In order to keep attorneys on the nongovernmental side of the classification line, the Court continued:

"Yet, they are not officials of government by virtue of being lawyers. Nor does the status of holding a license to practice law place one so close to the core of the political process as to make him a formulator of government policy." 413 U. S., at 729.

District Court expressed it well and forcefully when it observed that New York's exclusion "seems repugnant to the very heritage the State is seeking to inculcate." *Norwick* v. *Nyquist*, 417 F. Supp. 913, 922 (SDNY 1976).

I respectfully dissent.

Syllabus

GLADSTONE, REALTORS, ET AL. *v.* VILLAGE OF BELLWOOD ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 77–1493. Argued November 29, 1978—Decided April 17, 1979

Section 812 of the Fair Housing Act of 1968 (Act) provides that the rights granted by § 804 against racial discrimination in the sales or rental of housing "may be enforced by civil actions in appropriate United States district courts." Respondents (the village of Bellwood, one Negro and four white residents of Bellwood, and one Negro resident of a neighboring municipality) brought separate actions in District Court under § 812 against petitioners (two real estate brokerage firms and certain of their employees), alleging that they had violated § 804 by "steering" prospective Negro homeowners toward a specified 12- by 13-block integrated area ("target" area) of Bellwood and by steering white customers away from the "target" area. It was further alleged that Bellwood had been injured by having its housing market wrongfully manipulated to the economic and social detriment of its citizens and that the individual respondents had been denied their right to select housing without regard to race and had been deprived of the social and professional benefits of living in an integrated society. Monetary, injunctive, and declaratory relief was sought. Prior to bringing suit, the individual respondents, purportedly but not in fact seeking to purchase homes, had acted as "testers" in an attempt to determine whether petitioners were engaged in racial steering. Four of the six individual respondents reside in the "target" area. The District Court granted summary judgment for the petitioners in both cases, holding that respondents, who had acted only as testers and thus were at most indirect victims of the alleged violations, lacked standing to sue under § 812, which was limited to actions by "direct victims" of violations. The Court of Appeals reversed and remanded, holding that although the individual respondents lacked standing in their capacity as testers, they were entitled to prove that the discriminatory practices documented by their testing deprived them, as residents of the adversely affected area, of the social and professional benefits of living in an integrated society; that the requirements of Art. III had been satisfied as to both the individual respondents and respondent village; that § 810 of the Act—which provides that a "person aggrieved" by a violation of the

Act may seek conciliation from the Secretary of Housing and Urban Development (HUD) and if conciliation fails bring suit in district court—and § 812 provide alternative remedies available to precisely the same class of plaintiffs; and that the conclusion in *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U. S. 205, 209, that standing under § 810 extends "'as broadly as is permitted by Article III,'" is applicable to cases brought under § 812.

Held:

1. The Court of Appeals correctly interpreted §§ 810 and 812 as providing alternative remedies to precisely the same class of plaintiffs, with the result that standing under § 812, like that under § 810, is as broad as is permitted by Art. III. *Trafficante, supra.* This construction of the Act is consistent with both its language and its legislative history and with the interpretation of HUD, the agency primarily assigned to implement and administer the Act. Pp. 100–109.

2. The facts alleged in the complaints and revealed by initial discovery are sufficient to provide standing to respondents under Art. III, except with respect to the two individual respondents who do not reside within the "target" area, and thus summary judgments for petitioners should not have been entered. Pp. 109–116.

(a) If, as alleged, petitioners' sales practices actually have begun to rob Bellwood of its racial balance and stability, the village has standing to challenge the legality of that conduct. Pp. 109–111.

(b) The allegation that the "target" area is losing its integrated character because of petitioners' conduct is sufficient to satisfy Art. III with respect to the individual respondents who reside in that area. The constitutional limits of these respondents' standing to protest the intentional segregation of their community do not vary simply because that community is defined in terms of city blocks rather than, as in *Trafficante, supra,* by reference to apartment buildings, but instead are determined by the presence or absence of a "distinct and palpable injury" to respondents. *Warth* v. *Seldin,* 422 U. S. 490, 501. Moreover, to the extent that the complaints allege economic injury to these respondents resulting from a diminution in the value of their homes due to petitioners' conduct, convincing evidence of such a decrease in value would be sufficient under Art. III to allow standing to contest the legality of that conduct. Pp. 111–115.

569 F. 2d 1013, affirmed in part.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined.

REHNQUIST, J., filed a dissenting opinion, in which STEWART, J., joined, *post*, p. 116.

Jonathan T. Howe argued the cause for petitioners. With him on the briefs were *Russell J. Hoover, Barry Sullivan,* and *James A. McKenna.*

F. Willis Caruso argued the cause for respondents. With him on the brief was *Robert G. Schwemm.*

Deputy Solicitor General Wallace argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General McCree, Assistant Attorney General Days, Harriet S. Shapiro,* and *Walter W. Barnett.**

MR. JUSTICE POWELL delivered the opinion of the Court.

Title VIII of the Civil Rights Act of 1968, 82 Stat. 81, as amended, 42 U. S. C. § 3601 *et seq.*, commonly known as the Fair Housing Act of 1968 (Act), broadly prohibits discrimination in housing throughout the Nation. This case presents both statutory and constitutional questions concerning standing to sue under Title VIII.

I

Petitioners in this case are two real estate brokerage firms, Gladstone, Realtors (Gladstone), and Robert A. Hintze, Realtors (Hintze), and nine of their employees. Respondents are the village of Bellwood, a municipal corporation and suburb of Chicago, one Negro and four white residents of Bellwood, and one Negro resident of neighboring Maywood. During

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**William D. North* filed a brief for the National Association of Realtors as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *Charles A. Bane, Thomas D. Barr, Robert A. Murphy,* and *Norman J. Chachkin* for the Lawyers' Committee for Civil Rights Under Law; and by *Martin E. Sloane* for the National Committee Against Discrimination in Housing.

Arthur C. Thorpe and *John J. Gunther* filed a brief for the National League of Cities et al. as *amici curiae*.

the fall of 1975, the individual respondents and other persons consulted petitioners, stating that they were interested in purchasing homes in the general suburban area of which Bellwood is a part. The individual respondents were not in fact seeking to purchase homes, but were acting as "testers" in an attempt to determine whether petitioners were engaging in racial "steering," *i. e.*, directing prospective home buyers interested in equivalent properties to different areas according to their race.

In October 1975, respondents commenced an action under § 812 of the Act, 42 U. S. C. § 3612,[1] against Gladstone and its employees in the District Court for the Northern District of Illinois, alleging that they had violated § 804 of Title VIII, 42 U. S. C. § 3604.[2] Simultaneously, respondents filed a

[1] Section 812 provides in part:

"(a) The rights granted by sections 803, 804, 805, and 806 may be enforced by civil actions in appropriate United States district courts without regard to the amount in controversy and in appropriate State or local courts of general jurisdiction."

[2] Section 804 provides:

"As made applicable by section 803 and except as exempted by sections 803 (b) and 807, it shall be unlawful—

"(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin.

"(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, or national origin.

"(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, or national origin, or an intention to make any such preference, limitation, or discrimination.

"(d) To represent to any person because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

"(e) For profit, to induce or attempt to induce any person to sell or

virtually identical complaint against Hintze and its salespeople in the same court. The complaints, as illuminated by subsequent discovery, charged that petitioners had steered prospective Negro home buyers toward an integrated area of Bellwood approximately 12 by 13 blocks in dimension and away from other, predominately white areas. White customers, by contrast, allegedly were steered away from the integrated area of Bellwood. Four of the six individual respondents reside in this "target" area of Bellwood described in the complaint.[3] The complaints further alleged that the "Village of Bellwood . . . has been injured by having [its] housing market . . . wrongfully and illegally manipulated to the economic and social detriment of the citizens of [the] village," and that the individual respondents "have been denied their right to select housing without regard to race and have been deprived of the social and professional benefits of living in an integrated society." App. 6, 99. Respondents requested monetary, injunctive, and declaratory relief.

Petitioners moved for summary judgment in both cases, arguing that respondents had "no actionable claim or standing to sue" under the statutes relied upon in the complaint, that there existed "no case or controversy between the parties within the meaning of Article III of the Constitution," and that respondents failed to satisfy the prudential requirements for standing applicable in the federal courts. *Id.*, at 78, 143. The District Judge presiding over the case against Gladstone and its employees decided that respondents were not within the

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rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, or national origin." 82 Stat. 83, as amended, 88 Stat. 729.

Respondents also claimed that petitioners had violated 42 U. S. C. § 1982.

[3] Respondent Perry is a resident of Bellwood, but lives outside the area allegedly affected by petitioners' steering practices. Respondent Sharp lives in Maywood. These respondents are Negroes.

class of persons to whom Congress had extended the right to sue under § 812. The court expressly adopted the reasoning of *TOPIC* v. *Circle Realty*, 532 F. 2d 1273 (CA9 1976), a case involving facts similar to those here. In *TOPIC* the Ninth Circuit decided that Congress intended to limit actions under § 812 of the Act to "direct victims" of Title VIII violations, even though under *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U. S. 205 (1972), standing under § 810 [4] of the Act, 42

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[4] Section 810 provides in part:

"(a) Any person who claims to have been injured by a discriminatory housing practice or who believes that he will be irrevocably injured by a discriminatory housing practice that is about to occur (hereafter 'person aggrieved') may file a complaint with the Secretary [of HUD]. . . . Within thirty days after receiving a complaint, or within thirty days after the expiration of any period of reference under subsection (c), the Secretary shall investigate the complaint and give notice in writing to the person aggrieved whether he intends to resolve it. If the Secretary decides to resolve the complaint, he shall proceed to try to eliminate or correct the alleged discriminatory housing practice by informal methods of conference, conciliation, and persuasion. . . .

. . . . . .

"(c) Wherever a State or local fair housing law provides rights and remedies for alleged discriminatory housing practices which are substantially equivalent to the rights and remedies provided in this title, the Secretary shall notify the appropriate State or local agency of any complaint filed under this title which appears to constitute a violation of such State or local fair housing law, and the Secretary shall take no further action with respect to such complaint if the appropriate State or local law enforcement official has, within thirty days from the date the alleged offense has been brought to his attention, commenced proceedings in the matter, or, having done so, carries forward such proceedings with reasonable promptness. In no event shall the Secretary take further action unless he certifies that in his judgment, under the circumstances of the particular case, the protection of the rights of the parties or the interests of justice require such action.

"(d) If within thirty days after a complaint is filed with the Secretary or within thirty days after expiration of any period of reference under subsection (c), the Secretary has been unable to obtain voluntary compliance with this title, the person aggrieved may, within thirty days

U. S. C. § 3610, extends to the broadest class of plaintiffs permitted by Art. III. Since the individual respondents had been acting only as testers and thus admittedly had not been steered away from any homes they might have wished to purchase, the court concluded that they were, at most, only indirect victims of Gladstone's alleged violations of the Act. As respondents' action was brought under § 812, the court ruled that they lacked standing under the terms of the Act. The court did not discuss Gladstone's contention that respondents lacked standing under Art. III and the prudential limitations on federal jurisdiction. The District Judge presiding over the case against Hintze adopted the opinion of the Gladstone court as his own and also granted summary judgment.

The Court of Appeals for the Seventh Circuit consolidated the cases for appellate review. It first considered the significance of the fact that the individual respondents were merely testers not genuinely interested in purchasing homes. The court noted that while this precluded respondents from arguing that they had been denied their right to select housing without regard to race, "the testers did . . . generate evidence suggesting the perfectly permissible inference that [petitioners] have been engaging, as the complaints allege, in the *practice* of racial steering with all of the buyer prospects who come through their doors." 569 F. 2d 1013, 1016 (1978) (emphasis in original). Thus, although the individual respondents lacked standing in their capacity as testers, they were entitled to prove that the discriminatory practices documented by

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thereafter, commence a civil action in any appropriate United States district court, against the respondent named in the complaint, to enforce the rights granted or protected by this title, insofar as such rights relate to the subject of the complaint: *Provided*, That no such civil action may be brought in any United States district court if the person aggrieved has a judicial remedy under a State or local fair housing law which provides rights and remedies for alleged discriminatory housing practices which are substantially equivalent to the rights and remedies provided in this title. . . ." 82 Stat. 85.

their testing deprived them, as residents of the adversely affected area, "of the social and professional benefits of living in an integrated society."

The Court of Appeals then turned to the question whether the Art. III minima for standing had been satisfied. Observing the similarity between the allegations of injury here and those accepted as constitutionally sufficient in *Trafficante*, it concluded that the individual respondents had presented a case or controversy within the meaning of Art. III. The court also read the complaints as alleging economic injury to the village itself as a consequence of the claimed racial segregation of a portion of Bellwood. Although this aspect of the case was not directly controlled by *Trafficante*, the court found that the requirements of Art. III had been satisfied.[5]

Having concluded that a case or controversy within the meaning of Art. III was before it, the Court of Appeals addressed the District Court's ruling that § 812 of the Act, unlike § 810, affords standing only to those directly injured by the discriminatory acts challenged. After considering the legislative history and recent federal-court decisions construing these provisions, the court concluded, contrary to the decision in *TOPIC* v. *Circle Realty, supra*, that §§ 810 and 812 provide alternative remedies available to precisely the same class of plaintiffs. The conclusion of this Court in *Trafficante* that standing under § 810 extends " 'as broadly as is permitted by Article III of the Constitution,' " 409 U. S., at 209, quoting *Hackett* v. *McGuire Bros., Inc.*, 445 F. 2d 442, 446 (CA3 1971), was seen as applicable to these cases brought under § 812. The Court of Appeals reversed the judgments of the District Court and remanded for further proceedings.

Petitioners sought review in this Court. We granted cer-

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[5] The Court of Appeals agreed with the District Court that the Leadership Council for Metropolitan Open Communities, also a plaintiff in the two actions in the District Court, lacked standing. 569 F. 2d, at 1017. That ruling has not been challenged in this Court.

tiorari to resolve the conflict between the decision of the Court of Appeals in this case and that of the Ninth Circuit in *TOPIC*, and to consider the important questions of standing raised under Title VIII of the Civil Rights Act of 1968. 436 U. S. 956 (1978). With the limitation noted in n. 25, *infra*, we now affirm.

II

In recent decisions, we have considered in some detail the doctrine of standing in the federal courts. "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. This inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise. . . . In both dimensions it is founded in concern about the proper—and properly limited—role of the courts in a democratic society." *Warth* v. *Seldin*, 422 U. S. 490, 498 (1975).

The constitutional limits on standing eliminate claims in which the plaintiff has failed to make out a case or controversy between himself and the defendant. In order to satisfy Art. III, the plaintiff must show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant. *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U. S. 59, 72 (1978); *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252, 260–261 (1977); *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U. S. 26, 38 (1976); *Warth* v. *Seldin*, *supra*, at 499; *Linda R. S.* v. *Richard D.*, 410 U. S. 614, 617 (1973). Otherwise, the exercise of federal jurisdiction "would be gratuitous and thus inconsistent with the Art. III limitation." *Simon* v. *Eastern Kentucky Welfare Rights Org.*, *supra*, at 38.

Even when a case falls within these constitutional boundaries, a plaintiff may still lack standing under the prudential principles by which the judiciary seeks to avoid deciding

questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim. For example, a litigant normally must assert an injury that is peculiar to himself or to a distinct group of which he is a part, rather than one "shared in substantially equal measure by all or a large class of citizens." *Warth* v. *Seldin*, 422 U. S., at 499. He also must assert his own legal interests, rather than those of third parties.[6] *Ibid.* Accord, *Arlington Heights* v. *Metropolitan Housing Dev. Corp., supra*, at 263.

Congress may, by legislation, expand standing to the full extent permitted by Art. III, thus permitting litigation by one "who otherwise would be barred by prudential standing rules." *Warth* v. *Seldin*, 422 U. S., at 501. In no event, however, may Congress abrogate the Art. III minima: A plaintiff must always have suffered "a distinct and palpable injury to himself," *ibid.*, that is likely to be redressed if the requested relief is granted. *Simon* v. *Eastern Kentucky Welfare Rights Org., supra*, at 38.

III

Petitioners have insisted throughout this litigation that respondents lack standing under the terms of the Act. Their argument, which was accepted by the District Court, is that while § 810 provides standing to the fullest extent permitted by Art. III, see *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U. S., at 209, § 812, under which respondents proceed, affords standing only to "direct victims" of the conduct proscribed by Title VIII. Respondents, on the other hand, argue

[6] There are other nonconstitutional limitations on standing to be applied in appropriate circumstances. See, *e. g., Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U. S. 26, 39 n. 19 (1976) ("the interest of the plaintiff, regardless of its nature in the absolute, [must] at least be 'arguably within the zone of interests to be protected or regulated' by the statutory framework within which his claim arises," quoting *Data Processing Service* v. *Camp*, 397 U. S. 150, 153 (1969)).

that the Court of Appeals correctly concluded that §§ 810 and 812 are alternative remedies available to precisely the same class of plaintiffs. The issue is a critical one, for if the District Court correctly understood and applied § 812, we do not reach the question whether the minimum requirements of Art. III have been satisfied. If the Court of Appeals is correct, however, then the constitutional question is squarely presented.[7]

Petitioners' argument centers on two points. First, § 810 uses the term "person aggrieved," defined as "[a]ny person who claims to have been injured by a discriminatory housing practice," to describe those who may seek relief under that section. By contrast, § 812 lacks this broad definition of potential plaintiffs, referring explicitly only to civil suits brought to enforce the rights granted elsewhere in the Act. Second, under § 810 a plaintiff must first seek informal conciliation of housing discrimination disputes from the Department of Housing and Urban Development (HUD) and appropriate state agencies before pursuing a judicial remedy. See n. 4, *supra*. But under § 812 a complainant may proceed directly to federal court.

From these facts, petitioners infer a congressional plan to create two distinct, though overlapping, remedial avenues under Title VIII. Under § 810, they argue, Congress intended to reach *all* victims—both direct and indirect—of housing discrimination by referring generally to those "aggrieved." But in order to protect the courts from the volume of litiga-

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[7] It is not clear whether our opinion in *Trafficante* was intended to construe § 812 as well as § 810. Although certain intervening plaintiffs in that case asserted standing under § 812, but not § 810, see *Trafficante* v. *Metropolitan Life Ins. Co.*, 322 F. Supp. 352, 353 (ND Cal.), aff'd, 446 F. 2d 1158, 1161 n. 5 (CA9 1971), and the Court failed to disclaim a decision on the former provision, the opinion focuses exclusively on § 810. Rather than attempt to reconstruct whatever understanding of the relationship between §§ 810 and 812 might have been implicit in *Trafficante*, we consider the merits of this important statutory question directly.

tion such plaintiffs might generate, to make available the administrative expertise of state and federal agencies, and to involve state and local governments in national fair housing goals, Congress interposed administrative remedies as a prerequisite to the invocation of the federal judicial power by "indirect victims" of Title VIII violations.

Since § 812 does not specifically refer to "persons aggrieved" and allows direct access to the courts by those invoking it, petitioners argue that Congress must have intended this provision to be available only to those most in need of a quick, authoritative solution: those directly victimized by a wrongful refusal to rent or sell a dwelling place or by some other violation of the Act. The construction of § 812 accepted by the Court of Appeals, they contend, is illogical because it would permit a plaintiff simply to ignore, at his option, the scheme of administrative remedies set up in § 810. Thus, according to petitioners, "direct victims" may proceed under either § 810 or § 812, while those injured only indirectly by housing discrimination may proceed, if at all, under the former provision alone.

Finally, petitioners claim that the legislative history of the Act supports their view. That history reflects that Congress was concerned that Title VIII not be used as an instrument of harassment.[8] Petitioners contend that permitting individuals such as respondents, who have not been harmed directly by petitioners' alleged conduct, to invoke § 812 provides substantial opportunity for abuse of that kind.

We find this construction of Title VIII to be inconsistent with the statute's terms and its legislative history. Nothing in the language of § 812 suggests that it contemplates a more restricted class of plaintiffs than does § 810. The operative language of § 812 is phrased in the passive voice—"[t]he rights granted by sectio[n] 804 . . . may be enforced by civil

[8] This concern was expressed clearly in connection with an amendment to § 804 proposed by Senator Allott. See 114 Cong. Rec. 5515 (1968).

actions in appropriate United States district courts"—simply avoiding the need for a direct reference to the potential plaintiff. The absence of "person aggrieved" in § 812, therefore, does not indicate that standing is more limited under that provision than under § 810. To the contrary, § 812 on its face contains no particular statutory restrictions on potential plaintiffs.[9]

Contrary to petitioners' contention, § 810 is not structured to keep complaints brought under it from reaching the federal courts, or even to assure that the administrative process runs its full course. Section 810 (d) appears to give a complainant the right to commence an action in federal court whether or not the Secretary of HUD completes or chooses to pursue conciliation efforts.[10] Thus, a complainant under § 810 may

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[9] Both petitioners and the dissenting opinion, *post*, at 124, emphasize the language of § 812 that "[t]he rights granted by sectio[n] 804 . . . may be enforced by civil actions . . . ." See n. 1, *supra*. They argue that since § 804 on its face grants no right to have one's community protected from the harms of racial segregation, respondents have no substantive rights to enforce under § 812.

That respondents themselves are not granted substantive rights by § 804, however, hardly determines whether they may sue to enforce the § 804 rights of others. See *supra*, at 99–100. If, as is demonstrated in the text, Congress intended standing under § 812 to extend to the full limits of Art. III, the normal prudential rules do not apply; as long as the plaintiff suffers actual injury as a result of the defendant's conduct, he is permitted to prove that the rights of another were infringed. The central issue at this stage of the proceedings is not who possesses the legal rights protected by § 804, but whether respondents were genuinely injured by conduct that violates *someone's* § 804 rights, and thus are entitled to seek redress of that harm under § 812.

[10] The lower federal courts are divided over the question whether a Title VIII complainant who has enlisted the aid of HUD under § 810 must commence the civil action referred to in § 810 (d) no later than 60 days after the filing of his administrative complaint, even if HUD has not completed its conciliatory efforts by that time. Several courts believe the plain language of § 810 (d), see n. 4, *supra*, requires this result. *Green* v. *Ten Eyck*, 572 F. 2d 1233, 1240–1243 (CA8 1978); *Tatum* v. *Myrick*,

resort to federal court merely because he is dissatisfied with the results or delays of the conciliatory efforts of HUD.[11] The most plausible inference to be drawn from Title VIII is that Congress intended to provide all victims of Title VIII violations two alternative mechanisms by which to seek redress: immediate suit in federal district court, or a simple, inexpensive, informal conciliation procedure, to be followed by litigation should conciliation efforts fail.[12]

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425 F. Supp. 809, 810–812 (MD Fla. 1977); *Sumlin* v. *Brown*, 420 F. Supp. 78, 80–82 (ND Fla. 1976); *Brown* v. *Blake & Bane, Inc.*, 402 F. Supp. 621, 622 (ED Va. 1975); *Young* v. *AAA Realty Co.*, 350 F. Supp. 1382, 1385–1387 (MDNC 1972). Others, following HUD's interpretation of § 810 (d), see 24 CFR §§ 105.16 (a), 105.34 (1978), believe that the only time limitation on one who has properly complained to HUD is that a civil action be commenced within 30 days of notice of HUD's failure to negotiate a settlement. *Logan* v. *Richard E. Carmack & Assoc.*, 368 F. Supp. 121, 122–123 (ED Tenn. 1973); *Brown* v. *Ballas*, 331 F. Supp. 1033, 1036 (ND Tex. 1971). This case does not require us to resolve this conflict, and we express no views on it. But regardless of which position is correct, it is clear that § 810 does not serve as a screening mechanism to deflect certain classes of Title VIII grievances from the federal courts.

[11] Section 810 does appear to restrict access to the federal courts in one respect not paralleled by § 812. To the extent state or local remedies prove adequate, a complainant under § 810 is required to pursue them. Thus, under § 810 (c), the Secretary of HUD must suspend his conciliation efforts if local remedies providing protection equivalent to that of Title VIII are being carried forward by the appropriate public officials. Such deferral by the Secretary apparently delays the availability of judicial review under § 810 (d). Section 810 (d) also conditions the availability of its civil action on the absence of an equivalent state or local judicial remedy. Section 812 contains no such limitation.

We are convinced that neither these differences nor the variations between § 810 and § 812 relied upon by the dissent, see *post*, at 124–126, imply that § 810 is directed to a larger class of plaintiffs than is § 812. The legislative history, discussed in the text, contradicts any such suggestion. See *infra*, at 105–108, and n. 20.

[12] It is instructive to compare the administrative remedy of § 810 with that provided by § 706 of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e–5. Under § 810 (d), a complainant may simply bypass

Although the legislative history gave little help in determining the proper scope of standing under § 810, see *Trafficante*, 409 U. S., at 210, it provides substantial and rather specific support for the view that §§ 810 and 812 are available to precisely the same class of plaintiffs.[13] Early legislative proposals for fair housing legislation contained no administrative remedies.[14] The nonjudicial avenue of relief was later added on the theory that it would provide a more expeditious and less burdensome method of resolving housing complaints.[15]

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the conciliatory efforts of HUD by commencing a civil action, apparently without notice to the agency, 30 days after filing his complaint. Under § 706 (f)(1), by contrast, a complainant must allow the Equal Employment Opportunity Commission a full 180 days to negotiate a settlement, and he must obtain a "right-to-sue" letter before proceeding in federal court. Moreover, under § 706 (b), the EEOC is instructed to make a judgment on the merits of the administrative complaints it receives by dismissing those it does not have reasonable cause to believe are true. No such administrative statement on the merits of a § 810 complaint is required; the Secretary of HUD is asked only to indicate whether he "intends to resolve" a complaint. Finally, under § 706 (f)(1), the EEOC may elect to bring suit itself, thereby pre-empting the individual complainant's right to commence the litigation and exercising important supervision over the conduct of the case. The Secretary of HUD enjoys no similar authority under § 810. From these and other differences between the two statutes, it is apparent that § 810, unlike § 706, does not provide an effective administrative buffer between the federal courts and individual complainants.

[13] For a general review of the legislative history of Title VIII, see Dubofsky, Fair Housing: A Legislative History and a Perspective, 8 Washburn L. J. 149 (1969).

[14] Three bills containing fair housing provisions were introduced in Congress in 1966: S. 3296, 89th Cong., 2d Sess.; H. R. 14770, 89th Cong., 2d Sess.; H. R. 14765, 89th Cong., 2d Sess. As introduced, they provided for judicial enforcement only.

[15] Explaining the addition of administrative remedies to H. R. 14765, one of the bills introduced in 1966, Representative Conyers stated:

"Experience with comparable State and local agencies repeatedly has shown that the administrative process is quicker and fairer. It more quickly implements the rights of the person discriminated against and also quickly resolves frivolous and otherwise invalid complaints. Conciliation

There is no evidence that Congress intended to condition access to the courts on a prior resort to the federal agency. To the contrary, the history suggests that all Title VIII complainants were to have available immediate judicial review. The alternative, administrative remedy was then offered as an option to those who desired to use it.

This apparently was the understanding of Representative Celler who, as chairman of the House Judiciary Committee, summarized the Act on the floor of the House.[16] Similar perceptions were reflected in reports on the proposed legislation by the Department of Justice[17] and the House Judiciary

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is easier in an informal administrative procedure than in the formal judicial process. Also individual court suits would place a greater burden of expense, time and effort on not only the plaintiff but on all other parties involved, including the seller, broker and mortgage financier, and on the judicial system itself." 112 Cong. Rec. 18402 (1966).

Fair housing legislation introduced in 1967 similarly provided for administrative relief, which again was justified in terms of its perceived advantages to litigants over judicial review. Hearings on S. 1358 et al. before the Subcommittee on Housing and Urban Affairs of the Senate Committee on Banking and Currency, 90th Cong., 1st Sess., 108 (testimony of Roy Wilkins, Executive Director, NAACP, and Chairman, Leadership Conference on Civil Rights).

The administrative remedies in the 1966 and 1967 proposals would have granted substantive enforcement powers to HUD. Although Title VIII, enacted in 1968, provided for only informal, conciliatory efforts by that agency, petitioners have identified nothing in the legislative history suggesting that the purpose for including an administrative avenue of relief had changed from that stated with respect to the 1966 and 1967 bills.

[16] In describing the enforcement provisions of Title VIII, Representative Celler stated: "In addition to administrative remedies, the bill authorizes immediate civil suits by private persons within 180 days after the alleged discriminatory housing practice occurred . . . ." 114 Cong. Rec. 9560 (1968).

[17] The Justice Department report explained an amendment to the proposed Fair Housing Act offered by Senator Dirksen, which contained the enforcement provisions ultimately enacted as §§ 810 and 812. It states:

"In addition to the administrative remedy provided through the Department of Housing and Urban Development, the bill provides for an

Committee.[18] HUD, the federal agency primarily assigned to implement and administer Title VIII, consistently has treated §§ 810 and 812 as alternative remedial provisions.[19] Under familiar principles, see *Teamsters* v. *Daniel*, 439 U. S. 551, 566 n. 20 (1979); *Udall* v. *Tallman*, 380 U. S. 1, 16 (1965), and as we stated in *Trafficante*, *supra*, at 210, the agency's interpretation of the statute ordinarily commands considerable deference.

Petitioners have identified nothing in the legislative history contrary to this view. Their reliance on the expressed intent that Title VIII not be used for harassment is unconvincing. Nowhere does the history of the Act suggest that Congress attempted to deter possible harassment by limiting standing under § 812. Indeed, such an attempt would have been

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immediate right to proceed by civil action in an appropriate Federal or State court." 114 Cong. Rec. 4908 (1968).

[18] The House Judiciary Committee Report states:

"Section 812 states what is apparently an alternative to the conciliation-then-litigation approach [of § 810]: an *aggrieved person* within 180 days after the alleged discriminatory practice occurred, may, without complaining to HUD, file an action in the appropriate U. S. district court." *Id.*, at 9612 (emphasis added).

The use of the term "aggrieved person" to refer to potential plaintiffs under § 812, as well as the reference to the § 812 remedy as an alternative to that of § 810, indicates that the authors of this Report believed the two sections were intended to reach a single class of plaintiffs.

[19] In its regulations describing the process of administrative conciliation under § 810, HUD provides that every "person aggrieved [who files a complaint with HUD] shall be notified of . . . his right to bring court action under sections 810 and 812." 24 CFR § 105.16 (a) (1978). The regulations suggest no distinction between complainants under § 810 and plaintiffs under § 812.

In a handbook designed for internal agency use, § 812 is described as an "additional remed[y] for discriminatory housing practices [that] may be pursued concurrently with the complaint procedure [of § 810]." Department of Housing and Urban Development, Title VIII Field Operations Handbook 59 (1971).

pointless, given the relatively easy access to the courts provided by § 810.[20]

Most federal courts that have considered the issue agree that §§ 810 and 812 provide parallel remedies to precisely the same prospective plaintiffs. *E. g., Wheatley Heights Neighborhood Coalition* v. *Jenna Resales Co.*, 429 F. Supp. 486, 489–492 (EDNY 1977); *Village of Park Forest* v. *Fairfax Realty*, P–H 1 EOHC ¶ 13,699, pp. 14,467–14,468 (ND Ill. 1975); *Fair Housing Council* v. *Eastern Bergen County Multiple Listing Serv., Inc.*, 422 F. Supp. 1071, 1081–1083 (NJ 1976). See also *Howard* v. *W. P. Bill Atkinson Enterprises*, 412 F. Supp. 610, 611 (WD Okla. 1975); *Miller* v. *Poretsky*, 409 F. Supp. 837, 838 (DC 1976); *Young* v. *AAA Realty Co.*, 350 F. Supp. 1382, 1384–1385 (MDNC 1972); *Crim* v. *Glover*, 338 F. Supp. 823, 825 (SD Ohio 1972); *Johnson* v. *Decker*, 333 F. Supp. 88, 90–92 (ND Cal. 1971); *Brown* v. *Lo Duca*, 307 F. Supp. 102, 103–104 (ED Wis. 1969). The notable exception is the Ninth Circuit in *TOPIC* v. *Circle Realty*, 532 F. 2d 1273 (1976), upon which petitioners rely. For the rea-

[20] Although the legislative history is not free from some ambiguity, we do not agree with the view of it taken by the dissenting opinion. See *post*, at 126–128. The fact that, under Senator Miller's amendment, Title VIII complainants choosing to avail themselves of the informal, administrative procedures under § 810 are required to exhaust state remedies equivalent to Title VIII does not compel any particular conclusion about the size of the class to which § 812 extends. It was not irrational for Congress to conclude that, even with its limited exhaustion requirement, the incentive of § 810's simple, inexpensive conciliation procedure, as opposed to the immediate commencement of a formal lawsuit in federal district court under § 812, would be an attractive alternative to many of those aggrieved under Title VIII. Thus, under our construction of § 812, the exhaustion requirement of § 810 is not rendered meaningless. Apart from the argument based on the Miller amendment, the dissent relies on nothing more than an isolated, rhetorical remark by one Senator. Nothing in the legislative history or the administrative practices of HUD affirmatively supports the view that standing under § 810 is not identical to that under § 812.

sons stated, we believe that the Court of Appeals in this case correctly declined to follow *TOPIC*. Standing under § 812, like that under § 810, is "'as broa[d] as is permitted by Article III of the Constitution.'" *Trafficante*, 409 U. S., at 209.[21]

IV

We now consider the standing of the village of Bellwood and the individual respondents in light of Art. III. We "accept as true all material allegations of the complaint, and . . . construe the complaint in favor of the complaining party," *Warth* v. *Seldin*, 422 U. S., at 501, as standing was challenged largely on the basis of the pleadings.[22]

A

The gist of Bellwood's complaint is that petitioners' racial steering effectively manipulates the housing market in the

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[21] Petitioners argue that regardless of the scope of standing under § 812, the village of Bellwood cannot sue under that provision since it is not a "private person" as referred to in the caption to § 812.

The Court of Appeals noted that "[i]n a single sentence at oral argument, counsel for [petitioners] advanced the argument, not mentioned in their brief, that the Village lacks standing because it is not a 'person' as defined in [§ 802 (d)]." 569 F. 2d, at 1020 n. 8. The court rejected this contention, reasoning that the inclusion of "corporation" in the Act's definition of person encompassed municipal corporations such as Bellwood. *Ibid.* In this Court, petitioners have not argued that the village is not a "person," contending instead that it is not a "private person." Petitioners thus have presented a variant of the question raised belatedly in the Court of Appeals and given, perhaps deservedly, only cursory treatment there. Under these circumstances, the question whether Bellwood is a "private person" entitled to sue under § 812 is not properly before us, and we express no views on it.

[22] In addition to the complaints, the records in these cases contain several admissions by respondents, answers to petitioners' interrogatories, and exhibits appended to those answers, including maps of Bellwood. As did the courts below and the parties themselves, we accept as true the facts contained in these discovery materials for the purposes of the standing issue.

described area of the village: Some whites who otherwise would purchase homes there do not do so simply because petitioners refrain from showing them what is available; conversely, some Negroes purchase homes in the affected area solely because petitioners falsely lead them to believe that no suitable homes within the desired price range are available elsewhere in the general area. Although the complaints are more conclusory and abbreviated than good pleading would suggest, construed favorably to Bellwood they allege that this conduct is affecting the village's racial composition, replacing what is presently an integrated neighborhood with a segregated one.

The adverse consequences attendant upon a "changing" neighborhood can be profound. If petitioners' steering practices significantly reduce the total number of buyers in the Bellwood housing market, prices may be deflected downward. This phenomenon would be exacerbated if perceptible increases in the minority population directly attributable to racial steering precipitate an exodus of white residents. Cf. *Zuch* v. *Hussey*, 394 F. Supp. 1028, 1030, 1054 (ED Mich. 1975), order aff'g and remanding, 547 F. 2d 1168 (CA6 1977); *Barrick Realty, Inc.* v. *City of Gary*, 354 F. Supp. 126, 135 (ND Ind. 1973), aff'd, 491 F. 2d 161 (CA7 1974); *United States* v. *Mitchell*, 335 F. Supp. 1004, 1005 (ND Ga. 1971), aff'd *sub nom. United States* v. *Bob Lawrence Realty, Inc.*, 474 F. 2d 115 (CA5), cert. denied, 414 U. S. 826 (1973).[23] A significant reduction in property values directly injures a

[23] *Zuch* and *Mitchell* were cases in which real estate brokers were accused of "blockbusting," *i. e.*, exploiting fears of racial change by directly perpetuating rumors and soliciting sales in target neighborhoods. Respondents have not alleged that petitioners engaged in such unprincipled conduct, but the description in those cases of the reaction of some whites to a perceived influx of minority residents underscores the import of Bellwood's allegation that petitioners' sales practices threaten serious economic dislocation to the village.

municipality by diminishing its tax base, thus threatening its ability to bear the costs of local government and to provide services. Other harms flowing from the realities of a racially segregated community are not unlikely.[24] As we have said before, "[t]here can be no question about the importance" to a community of "promoting stable, racially integrated housing." *Linmark Associates, Inc.* v. *Willingboro,* 431 U. S. 85, 94 (1977). If, as alleged, petitioners' sales practices actually have begun to rob Bellwood of its racial balance and stability, the village has standing to challenge the legality of that conduct.

B

The individual respondents appeared before the District Court in two capacities. First, they and other individuals had acted as testers of petitioners' sales practices. In this Court, however, respondents have not pressed the claim that they have standing to sue as testers, see Brief for Respondents 14–15, and we therefore do not reach this question. Second, the individual respondents claimed to be injured as homeowners in the community against which petitioners' alleged steering has been directed. It is in this capacity that they claim standing to pursue this litigation.

Four of the individual respondents actually reside within the target area of Bellwood. They claim that the transformation of their neighborhood from an integrated to a predominantly Negro community is depriving them of "the social and professional benefits of living in an integrated society." This allegation is similar to that presented in *Trafficante.* In that case, a Negro and a white resident of a large apartment com-

[24] It has been widely recognized, for example, that school segregation is linked closely to housing segregation. See, *e. g., Lee* v. *Nyquist,* 318 F. Supp. 710, 717 (WDNY 1970) (three-judge court), summarily aff'd, 402 U. S. 935 (1971); National Advisory Commission on Civil Disorders, Report 237 (1968); 114 Cong. Rec. 2276 (1968) (remarks of Sen. Mondale).

plex in San Francisco complained that the landlord's exclusion of nonwhites from the complex stigmatized them as residents of a "white ghetto" and deprived them of the social and professional advantages of living in an integrated community. Noting the importance of the "benefits from interracial associations," 409 U. S., at 210, and in keeping with the Court's recent statement that noneconomic injuries may suffice to provide standing, *Sierra Club* v. *Morton*, 405 U. S. 727, 734–735 (1972), we concluded that this injury was sufficient to satisfy the constitutional standing requirement of actual or threatened harm.

Petitioners argue that *Trafficante* is distinguishable because the complainants in that case alleged harm to the racial character of their "community," whereas respondents refer only to their "society." Reading the complaints as a whole, and remembering that we encounter these allegations at the pleading stage, we attach no particular significance to this difference in word choice. Although an injury to one's "society" arguably would be an exceptionally generalized harm or, more important for Art. III purposes, one that could not conceivably be the result of these petitioners' conduct, we are obliged to construe the complaint favorably to respondents, against whom the motions for summary judgment were made in the District Court. So construed, and read in context, the allegations of injury to the individual respondents' "society" refer to the harm done to the residents of the carefully described neighborhood in Bellwood in which four of the individual respondents reside.[25] The question before us,

[25] As previously indicated, n. 3, *supra*, neither respondent Perry nor respondent Sharp resides within the target neighborhood of Bellwood. We read the complaints as claiming injury only to that area and its residents, and we are unable to find any allegations of harm to individuals residing elsewhere. On the record before us, we therefore conclude that summary judgment as to these two respondents was appropriate. We note, however, that the standing issue as framed by the District Court

therefore, is whether an allegation that this particular area is losing its integrated character because of petitioners' conduct is sufficient to satisfy Art. III.[26]

Petitioners suggest that there is a critical distinction between an apartment complex, even one as large as that in *Trafficante*,[27] and a 12- by 13-block residential neighborhood. Although there are factual differences, we do not view them as controlling in this case. We note first that these differences arguably may run in favor of standing for the individual respondents, according to how one views his living environment. Apartment dwellers often are more mobile, with less attachment to a community as such, and thus are able to react more quickly to perceived social or economic changes.

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was simply whether respondents were direct, as opposed to indirect, victims of the steering practices of petitioners. Viewed in that context, it made no difference whether Perry and Sharp were residents of the target area or not, for they would be found to be without standing in either event. As stated in Part III, *supra*, the District Court's perception of the standing question was incorrect. Only upon reaching this Court has the failure of the complaints to make sufficient allegations as to these two individuals been put in issue clearly. Although we intimate no view as to whether persons residing outside of the target neighborhood have standing to sue under § 812 of Title VIII, we do not foreclose consideration of this question if, on remand, the District Court permits respondents Perry and Sharp to amend their complaints to include allegations of actual harm.

[26] Apart from the use of "community" rather than "society," the complaint in *Trafficante* differed from those here in that it alleged that a segregated community was prevented from becoming integrated because of the defendant's conduct. Here, by contrast, respondents claim that an integrated neighborhood is becoming a segregated community because of petitioners' conduct. We find this difference unimportant to our analysis of standing. In both situations, the deprivation of the benefits of interracial associations constitutes the alleged injury.

[27] The apartment complex in *Trafficante* housed 8,200 tenants. 409 U. S., at 206. The population of Bellwood, of which the target neighborhood is only a part, was estimated at 20,969 in 1975. Department of Commerce, Bureau of the Census, Population Estimates and Projections, Series P–25, No. 661, p. Ill. 15 (1977).

The homeowner in a suburban neighborhood such as Bellwood may well have deeper community attachments and be less mobile. Various inferences may be drawn from these and other differences, but for the purpose of standing analysis, we perceive no categorical distinction between injury from racial steering suffered by occupants of a large apartment complex and that imposed upon residents of a relatively compact neighborhood such as Bellwood.[28]

The constitutional limits of respondents' standing to protest the intentional segregation of their community do not vary simply because that community is defined in terms of city blocks rather than apartment buildings. Rather, they are determined by the presence or absence of a "distinct and palpable injury," *Warth* v. *Seldin*, 422 U. S., at 501, to respondents resulting from petitioners' conduct. A "neighborhood" whose racial composition allegedly is being manipulated may be so extensive in area, so heavily or even so sparsely populated, or so lacking in shared social and commercial intercourse that there would be no actual injury to a particular resident. The presence of a genuine injury should be ascertainable on the basis of discrete facts presented at trial.[29]

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[28] See *Shannon* v. *HUD*, 305 F. Supp. 205, 208, 211 (ED Pa. 1969), aff'd in part, 436 F. 2d 809, 817–818 (CA3 1970) (residents in a neighborhood affected by urban renewal project have standing to challenge the project's impact on the neighborhood's racial balance). Accord, *Fox* v. *HUD*, 416 F. Supp. 954, 955–956 (ED Pa. 1976); *Marin City Council* v. *Marin County Redevelopment Agency*, 416 F. Supp. 700, 702, 704 (ND Cal. 1975). See also Comment, The Fair Housing Act: Standing for the Private Attorney General, 12 Santa Clara Law. 562, 568–571 (1972).

[29] In addition to evidence about the community, it will be relevant at trial to consider the nature and extent of the business of the petitioner real estate brokers. This should include an inquiry into the extent of their participation in the purchase, sale, and rental of residences in the target area, the number and race of their customers, and the type of housing desired by customers. Evidence of this kind may be relevant to the establishment of the necessary causal connection between the alleged conduct and the asserted injury. Respondents apparently attempted to

In addition to claiming the loss of social and professional benefits to the individual respondents, the complaints fairly can be read as alleging economic injury to them as well.[30] The most obvious source of such harm would be an absolute or relative diminution in value of the individual respondents' homes. This is a fact subject to proof before the District Court, but convincing evidence that the economic value of one's own home has declined as a result of the conduct of another certainly is sufficient under Art. III to allow standing to contest the legality of that conduct.

V

We conclude that the facts alleged in the complaints and revealed by initial discovery are sufficient to provide standing under Art. III. It remains open to petitioners, of course, to contest these facts at trial.[31] The adequacy of proof of respondents' standing is not before us, and we express no views on it.[32] We hold only that the summary judgments should not have been entered on the records before the District Court, except with respect to respondents Perry and Sharp.

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discover such information, but summary judgment was entered against them before this was accomplished.

[30] The complaints state that petitioners have manipulated the housing market of Bellwood "to the economic and social detriment of the citizens of [the] village." App. 6, 99.

[31] Although standing generally is a matter dealt with at the earliest stages of litigation, usually on the pleadings, it sometimes remains to be seen whether the factual allegations of the complaint necessary for standing will be supported adequately by the evidence adduced at trial.

[32] The federal courts that have considered the question have concluded that racial steering is prohibited by Title VIII. *E. g., Wheatley Heights Neighborhood Coalition* v. *Jenna Resales Co.*, 429 F. Supp. 486, 488 (EDNY 1977); *United States* v. *Real Estate One, Inc.*, 433 F. Supp. 1140, 1144 (ED Mich. 1977); *Fair Housing Council* v. *Eastern Bergen County Multiple Listing Serv., Inc.*, 422 F. Supp. 1071, 1075 (NJ 1976). We do not reach this issue, as it is not presented by this case.

See n. 25, *supra*. Subject to this exception, the judgment of the Court of Appeals is affirmed.[33]

So ordered.

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE STEWART joins, dissenting.

Title VIII of the Civil Rights Act of 1968, 82 Stat. 81, as amended, 42 U. S. C. § 3601 *et seq.*, which outlaws discrimination in virtually all aspects of the sale or rental of housing, provides two distinct and widely different routes into federal court. Under § 810, 42 U. S. C. § 3610,[1] a "person aggrieved,"

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[33] The Court of Appeals found it unnecessary to consider respondents' standing under § 1982. For this reason, and because of our decision with respect to respondents' standing under Title VIII, we do not reach the § 1982 issue.

[1] Section 810 provides:

"(a) Any person who claims to have been injured by a discriminatory housing practice or who believes that he will be irrevocably injured by a discriminatory housing practice that is about to occur (hereafter 'person aggrieved') may file a complaint with the Secretary. Complaints shall be in writing and shall contain such information and be in such form as the Secretary requires. Upon receipt of such a complaint the Secretary shall furnish a copy of the same to the person or persons who allegedly committed or are about to commit the alleged discriminatory housing practice. Within thirty days after receiving a complaint, or within thirty days after the expiration of any period of reference under subsection (c), the Secretary shall investigate the complaint and give notice in writing to the person aggrieved whether he intends to resolve it. If the Secretary decides to resolve the complaint, he shall proceed to try to eliminate or correct the alleged discriminatory housing practice by informal methods of conference, conciliation, and persuasion. Nothing said or done in the course of such informal endeavors may be made public or used as evidence in a subsequent proceeding under this title without the written consent of the persons concerned. Any employee of the Secretary who shall make public any information in violation of this provision shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or imprisoned not more than one year.

"(b) A complaint under subsection (a) shall be filed within one hundred

that is, "[a]ny person who claims to have been injured by a discriminatory housing practice," may seek administrative relief from the Secretary of the Department of Housing and

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and eighty days after the alleged discriminatory housing practice occurred. Complaints shall be in writing and shall state the facts upon which the allegations of a discriminatory housing practice are based. Complaints may be reasonably and fairly amended at any time. A respondent may file an answer to the complaint against him and with the leave of the Secretary, which shall be granted whenever it would be reasonable and fair to do so, may amend his answer at any time. Both complaints and answers shall be verified.

"(c) Wherever a State or local fair housing law provides rights and remedies for alleged discriminatory housing practices which are substantially equivalent to the rights and remedies provided in this title, the Secretary shall notify the appropriate State or local agency of any complaint filed under this title which appears to constitute a violation of such State or local fair housing law, and the Secretary shall take no further action with respect to such complaint if the appropriate State or local law enforement official has, within thirty days from the date the alleged offense has been brought to his attention, commenced proceedings in the matter, or, having done so, carries forward such proceedings with reasonable promptness. In no event shall the Secretary take further action unless he certifies that in his judgment, under the circumstances of the particular case, the protection of the rights of the parties or the interests of justice require such action.

"(d) If within thirty days after a complaint is filed with the Secretary or within thirty days after expiration of any period of reference under subsection (c), the Secretary has been unable to obtain voluntary compliance with this title, the person aggrieved may, within thirty days thereafter, commence a civil action in any appropriate United States district court, against the respondent named in the complaint, to enforce the rights granted or protected by this title, insofar as such rights relate to the subject of the complaint: *Provided*, That no such civil action may be brought in any United States district court if the person aggrieved has a judicial remedy under a State or local fair housing law which provides rights and remedies for alleged discriminatory housing practices which are substantially equivalent to the rights and remedies provided in this title. Such actions may be brought without regard to the amount in controversy in any United States district court for the district in which the discriminatory housing practice is alleged to have occurred or be about to occur or

Urban Development and, if the Secretary cannot within 30 days resolve the dispute "by informal methods of conference, conciliation, and persuasion," may bring a civil action in federal district court. In *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U. S. 205 (1972), we held that the broad definition given to the term "person aggrieved" in § 810 evinced "'a congressional intention to define standing as broadly as is permitted by Article III of the Constitution.'" 409 U. S., at 209.

The second route into federal court under Title VIII—§ 812[2]—provides simply that "[t]he rights granted by sec-

in which the respondent resides or transacts business. If the court finds that a discriminatory housing practice has occurred or is about to occur, the court may, subject to the provisions of section 812 of this title, enjoin the respondent from engaging in such practice or order such affirmative action as may be appropriate.

"(e) In any proceeding brought pursuant to this section, the burden of proof shall be on the complainant.

"(f) Whenever an action filed by an individual, in either Federal or State court, pursuant to this section or section 812 of this title, shall come to trial the Secretary shall immediately terminate all efforts to obtain voluntary compliance." 82 Stat. 85, 42 U. S. C. § 3610.

[2] Section 812 provides:

"(a) The rights granted by sections 803, 804, 805, and 806 of this title may be enforced by civil actions in appropriate United States district courts without regard to the amount in controversy and in appropriate State or local courts of general jurisdiction. A civil action shall be commenced within one hundred and eighty days after the alleged discriminatory housing practice occurred: *Provided, however,* That the court shall continue such civil case brought pursuant to this section or section 810 (d) of this title from time to time before bringing it to trial if the court believes that the conciliation efforts of the Secretary or a State or local agency are likely to result in satisfactory settlement of the discriminatory housing practice complained of in the complaint made to the Secretary or to the local or State agency and which practice forms the basis for the action in court: *And provided, however,* That any sale, encumbrance, or rental consummated prior to the issuance of any court order issued under the authority of this Act, and involving a bona fide purchaser, encumbrancer, or tenant without actual notice of the existence of the filing of a

tions 803, 804, 805, and 806 of this title may be enforced by civil actions in appropriate United States district courts . . . ." 42 U. S. C. § 3612. Despite the absence from § 812 of the "person aggrieved" language so crucial to our holding in *Trafficante* regarding standing under § 810, the Court today holds that "[s]tanding under § 812, like that under § 810, is 'as broa[d] as is permitted by Article III of the Constitution.' " *Ante*, at 109, quoting *Trafficante* v. *Metropolitan Life Ins. Co.*, *supra*, at 209. I think that the Court's decision ignores the plain language of § 812 and makes nonsense out of Title VIII's formerly sensible statutory enforcement scheme.

I

The doctrine of standing is comprised of both constitutional limitations on the jurisdiction of federal courts and prudential rules of self-restraint designed to bar from federal court those parties who are ill-suited to litigate the claims they assert. In its constitutional dimension, the standing inquiry asks whether the party before the court has " 'such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction and to justify

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complaint or civil action under the provisions of this Act shall not be affected.

"(b) Upon application by the plaintiff and in such circumstances as the court may deem just, a court of the United States in which a civil action under this section has been brought may appoint an attorney for the plaintiff and may authorize the commencement of a civil action upon proper showing without the payment of fees, costs, or security. A court of a State or subdivision thereof may do likewise to the extent not inconsistent with the law or procedures of the State or subdivision.

"(c) The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than $1,000 punitive damages, together with court costs and reasonable attorney fees in the case of a prevailing plaintiff: *Provided*, That the said plaintiff in the opinion of the court is not financially able to assume said attorney's fees." 82 Stat. 88, 42 U. S. C. § 3612.

exercise of the court's remedial powers on his behalf." *Warth* v. *Seldin*, 422 U. S. 490, 498–499 (1975) (emphasis in original), quoting *Baker* v. *Carr*, 369 U. S. 186, 204 (1962). The crucial elements of standing are injury in fact and causation. To demonstrate the "personal stake" in the litigation necessary to satisfy the Constitution, the party must suffer "a distinct and palpable injury," *Warth* v. *Seldin*, *supra*, at 501, that bears a " 'fairly traceable' causal connection" to the challenged action. *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U. S. 59, 72 (1978), quoting *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252, 261 (1977). Accordingly, when an objection to a party's standing to litigate in federal court is constitutionally based, "the relevant inquiry is whether . . . the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision." *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U. S. 26, 38 (1976).

A plaintiff who alleges sufficient injury to satisfy these minimum constitutional limitations on federal jurisdiction may nonetheless be barred from federal court under our prudential standing rules because he asserts a generalized grievance shared in substantially equal measure by all or a large class of citizens, *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U. S. 208 (1974), or because he seeks to "rest his claim to relief on the legal rights or interests of third parties" rather than his own. *Warth* v. *Seldin*, 422 U. S., at 499. These prudential rules, however, are subject to modification by Congress, which may grant to any person satisfying Art. III's minimum standing requirements a right "to seek relief on the basis of the legal rights and interests of others, and, indeed, [to] invoke the general public interest in support of [his] claim." *Id.*, at 501. Congress did just that in enacting § 810 of Title VIII, which grants to "[a]ny person who claims to have been injured by a discriminatory housing practice" a right to seek federal administrative and judicial relief. In *Trafficante*,

supra, we held that the broad definition given "person aggrieved" in § 810 indicated a congressional intent to accord apartment dwellers, who had not themselves suffered discrimination, an actionable right to be free from the adverse consequences flowing to them from racially discriminatory rental practices directed at third parties.[3] Plaintiffs' alleged "loss of important benefits from interracial associations," 409 U. S., at 210, was sufficient to satisfy the injury-in-fact requirement of Art. III.

In the case now before us, respondents—the village of Bellwood, five of its residents, and one resident of a neighboring community—brought suit against petitioner real estate firms, alleging that the firms had violated both 42 U. S. C. § 1982 and § 804 of Title VIII by "steering" prospective homebuyers to different areas in and around Bellwood according to their race. Like plaintiffs in *Trafficante*, the individual respondents allege that petitioners' practice of racial steering has deprived them of "the social and professional benefits of living in an integrated society."[4] App. 6, 99. Respondent village of Bellwood alleges that it has been injured "by having [its] housing market . . . wrongfully and illegally

[3] Despite suggestions to the contrary by the Court, *ante*, at 101 n. 7, our decision in *Trafficante* was clearly not intended to construe § 812 as well as § 810. The opinion focuses exclusively on § 810, closing with the following statement:

"We can give vitality to § 810 (a) only by a generous construction which gives standing to sue to all in the same housing unit who are injured by racial discrimination in the management of those facilities within the coverage of the statute." 409 U. S., at 212.

The Court's passing reference in *Trafficante* to § 812 can hardly be construed as an interpretation of that provision.

[4] Alleging injury to "their right to select housing without regard to race," App. 6, 99, the individual respondents initially sought to establish standing in their capacity as "testers." Respondents have abandoned, in this Court, their claim of standing as testers, electing to stand or fall on their allegations of injury in their capacity as residents in and around Bellwood.

manipulated to the economic and social detriment of [its] citizens." *Ibid.* Unlike plaintiffs in *Trafficante*, however, respondents have not proceeded under § 810 of Title VIII, choosing instead to travel the direct route into federal court provided by § 812.

In pertinent part, § 812 provides:

> "The rights granted by sections 803, 804, 805, and 806 may be enforced by civil actions in appropriate United States district courts without regard to the amount in controversy and in appropriate State or local courts of general jurisdiction." 82 Stat. 88, 42 U. S. C. § 3612 (a).

The language of § 812 contains no indication that Congress intended to authorize the commencement of suits under Title VIII by persons who would otherwise be barred from federal court by prudential standing rules. Indeed, were § 812 the only method for enforcing Title VIII, respondents—who were not themselves discriminated against by petitioners—could hardly argue that they were statutorily authorized to seek relief on the basis of legal rights and interests of third parties who had been racially "steered" into and away from certain areas in the community. The Court, however, in effect reads the broadly defined "person aggrieved" language of § 810 into § 812, holding that the alternative routes into federal court provided under the sections are available to precisely the same class of plaintiffs. The language and structure of Title VIII lead me to a contrary conclusion.

II

The term "person aggrieved" is used throughout § 810—no less than four times—to denominate the proper § 810 claimant; [5] by contrast, in § 812 Congress wholly avoided use of this broadly defined term, preferring instead the familiar "plaintiff." Noting that § 812 is phrased in the passive voice,

[5] Indeed, the term is found nowhere else in Title VIII.

the Court concludes that the absence of the "person aggrieved" language from the provision "does not indicate that standing is more *limited* under that provision than under § 810." *Ante*, at 103 (emphasis added). The point of our decision in *Trafficante*, however, was that the presence of the "person aggrieved" language in § 810 demonstrated Congress' affirmative intent to abrogate prudential standing rules and to *expand* standing under the section to the full extent permitted by Art. III of the Constitution. It thus follows that the absence of "person aggrieved" from § 812 indicates that Congress did not intend to abrogate the normal prudential rules of standing with regard to § 812.

Consistent with § 810's broad grant of standing is the language chosen by Congress to define the scope of the civil action that may be brought under the section: "[T]he person aggrieved may . . . commence a civil action in any appropriate United States district court . . . to enforce the rights granted *or protected* by this title . . . ." 82 Stat. 86, 42 U. S. C. § 3610 (d) (emphasis added). Section 812, in contrast, authorizes the commencement of a civil action to enforce only "[t]he rights granted by," as opposed to "rights granted or protected by," §§ 803, 804, 805, and 806. Clearly, Congress contemplated that § 812 suits could be instituted only by persons alleging injury to rights expressly secured under the enumerated sections.

Section 804, the provision allegedly offended by petitioners, provides in pertinent part:

> "[I]t shall be unlawful—
>
> "(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin.
>
> "(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or

in the provision of services or facilities in connection therewith, because of race, color, religion, sex, or national origin.

. . . . .

"(d) To represent to any person because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available." 82 Stat. 83, as amended, 88 Stat. 729, 42 U. S. C. § 3604.

In essence, § 804 grants to all persons[6] seeking housing the right not to be discriminated against on the basis of race, color, religion, sex, or national origin. Nowhere in the section are the individual respondents granted a right to reap the "social and professional benefits of living in an integrated society." Nor does § 804 grant the village of Bellwood an actionable right not to have its housing market "wrongfully and illegally manipulated." Accordingly, respondents have suffered no injury to "rights granted by [§ 804]."

The structure of both § 810 and § 812 and the significant differences between the two enforcement provisions further support the conclusion that Congress intended to restrict access to federal courts under § 812 to a more limited class of plaintiffs than that contemplated under § 810. A "person aggrieved" proceeding under § 810 must first file a complaint with the Secretary of Housing and Urban Development, who is authorized "to try to eliminate or correct the alleged discriminatory housing practice by informal methods of conference, conciliation, and persuasion." 42 U. S. C. § 3610 (a). The Secretary, however, must defer to the appropriate state

[6] "Person" is defined in Title VIII as "one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, receivers, and fiduciaries." 42 U. S. C. § 3602 (d).

or local agency whenever state or local fair-housing laws provide rights and remedies substantially equivalent to those secured under Title VIII. The Secretary may recommence action on the complaint only upon certification that such action is necessary to protect the rights of the parties or the interests of justice. 42 U. S. C. § 3610 (c). If the Secretary's informal efforts prove futile, the "person aggrieved" may commence a civil action under Title VIII in federal district court, but only if he has no comparable judicial remedy under "substantially equivalent" state or local fair-housing legislation. 42 U. S. C. § 3610 (d).

The § 812 "plaintiff" is not similarly encumbered. He may proceed directly into federal court, deferring neither to the Secretary of Housing and Urban Development nor to state administrative and judicial processes. See 42 U. S. C. § 3612 (a). The District Court is authorized to appoint an attorney for the § 812 plaintiff and to waive payment of fees, costs, and security. 42 U. S. C. § 3612 (b). Additionally, broader relief is available under § 812. The "prevailing plaintiff" may be awarded a "permanent or temporary injunction, temporary restraining order, or other order, and . . . actual damages and not more than $1,000 punitive damages, together with court costs and reasonable attorney fees . . . ." 42 U. S. C. § 3612 (c). Section 810, by contrast, makes no allowance for damages, costs, or counsel fees, limiting the victorious claimant to injunctive relief and such other affirmative action as may be appropriate. 42 U. S. C. § 3610 (d). Nor does § 812 contain a provision similar to § 810 (e), which provides that "[i]n any proceeding brought pursuant to [§ 810], the burden of proof shall be on the complainant." Given the advantages to the claimant of proceeding under § 812, it is hard to imagine why anyone would *voluntarily* proceed under § 810 if both routes were equally available.

When the carefully chosen language and the widely variant provisions of § 810 and § 812 are thus compared, the logic of

Title VIII's private enforcement mechanism becomes clear. Immediate access to federal judicial power under § 812 was reserved to those directly victimized by a discriminatory housing practice; that is, those actually discriminated against on the basis of race, color, religion, sex, or national origin. Only direct victims of housing discrimination were deemed to suffer injuries of sufficient magnitude to authorize appointment of counsel and recovery of compensatory and punitive damages, costs, and attorney fees. But because discrimination in housing can injure persons other than the direct objects of the discrimination, *Trafficante*, 409 U. S., at 210, Congress believed that the statute's fair-housing goals would be served by extending standing under § 810 as broadly as constitutionally permissible. Anyone claiming to have been injured by a discriminatory housing practice, even if not himself directly discriminated against, is authorized to seek redress under § 810. By barring indirect victims of housing discrimination from immediate access to federal court under § 812, and thus requiring them to exhaust federal conciliation procedures as well as viable state and local remedies pursuant to § 810, Congress sought to facilitate informal resolution of Title VIII disputes, to avoid federal judicial intervention when possible, and to encourage state and local involvement in the effort to eliminate housing discrimination.

The legislative history of Title VIII, while "not too helpful," *Trafficante, supra*, at 210, supports the view that standing to commence a civil action under § 812 is limited to direct victims of housing discrimination. Introduced on the Senate floor and approved unchanged by the House, Title VIII's legislative history must be culled primarily from the Congressional Record. The brief debate preceding adoption of Amendment No. 586, which amended § 810 to require exhaustion of "substantially equivalent" remedies under state or local fair-housing laws as a prerequisite to the filing of a Title

VIII action in federal court, is particularly enlightening. Senator Miller, who introduced the amendment, explained:

> "I provide in the second part of my amendment that no civil action may be brought in any U. S. district court if the person aggrieved has a judicial remedy under a State or local fair housing law which provides substantially equivalent rights and remedies to this act.
>
> "I believe it is a matter of letting the State and local courts have jurisdiction. We in the Senate know that our Federal district court calendars are crowded enough, without adding to that load if there is a good remedy under State law." 114 Cong. Rec. 4987 (1968).

Senator Hart added that the amendment "recognizes the desire all of us share that the State remedies, where adequate, be availed of and that unnecessary burdening litigation not further clog the court calendars." *Ibid.* It seems unlikely that Congress would wholly frustrate the concerns moving it to adopt § 810's exhaustion requirement by opening § 812's direct route into federal court to all "persons aggrieved."

The debate concerning the allowance of attorney's fees to prevailing plaintiffs under § 812 also indicates a congressional understanding that standing to proceed immediately into federal court under § 812 was limited to discriminatees. Senator Hart commented that §§ 812 (b) and (c)—which authorize the district court to waive payment of fees, costs, and security in appropriate cases and to award damages, court costs, and reasonable attorney fees to prevailing plaintiffs—"reveal a clear congressional intent to permit, and even encourage, litigation by those who cannot afford to redress *specific wrongs aimed at them because of the color of their skin.*" 114 Cong. Rec. 5514–5515 (1968) (emphasis added).

The meager legislative history marshaled by the Court provides at best thin support for its expansive interpretation of standing under § 812. References in the legislative history describing § 812 as an "addition[al]" and "alternative" reme-

dial provision to § 810, *ante*, at 106, and nn. 16, 17, and 18, are hardly dispositive: one need only read the two sections to conclude that they provide "alternative" enforcement mechanisms. That § 810 and § 812 are "alternative" remedial provisions does not, however, compel the conclusion that they are equally available to all potential Title VIII claimants. The only piece of legislative history arguably supporting the Court's interpretation of § 812 is the House Judiciary Committee staff's use of the term "aggrieved person" to refer to potential § 812 plaintiffs. *Ante*, at 107 n. 18. This single, fleeting reference in the legislative history hardly seems sufficient to overwhelm the contrary indications of congressional intent found elsewhere in Title VIII's legislative history and in the carefully worded and structured provisions of § 810 and § 812.

I think that *Trafficante* pushed standing to the limit in construing the "person aggrieved" language of § 810. I cannot join the Court in pressing the more narrowly confined language of § 812 to the same limit.

III

Respondents also claim standing under 42 U. S. C. § 1982, which provides: "All citizens of the United States shall have the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property." Unlike Title VIII, "§ 1982 is not a comprehensive open housing law." *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409, 413 (1968). Enacted as part of the Civil Rights Act of 1866, the section bars all racial discrimination, both private and public, in the sale or rental of property. *Ibid.*

It is clear that respondents have suffered no injury to the only right secured under § 1982—the right to be free from racially motivated interference with property rights. Their claim of standing under § 1982 is thus conceptually indistinguishable from a similar claim rejected by this Court in

Warth v. *Seldin*, 422 U. S. 490 (1975). Plaintiffs in *Warth* brought a § 1982 action against the town of Penfield, N. Y., and members of its Zoning, Planning, and Town Boards, claiming that the town's zoning ordinance effectively excluded persons of minority racial and ethnic groups. One of the plaintiffs, a nonprofit corporation organized to alleviate the housing shortage for low- and moderate-income persons in and around Penfield, based its standing to challenge the zoning ordinance on the loss to its members residing in Penfield of the "benefits of living in a racially and ethnically integrated community." 422 U. S., at 512. This Court rejected plaintiff's claim of standing, distinguishing *Trafficante* on the ground that § 1982, unlike § 810 of Title VIII, does not give residents of certain communities an actionable right to be free from the adverse consequences of racially discriminatory practices directed at and immediately harmful to others. Thus, we held plaintiff's "attempt to raise putative rights of third parties," 422 U. S., at 514, barred by the prudential rules of standing.

Like plaintiffs in *Warth*, respondents claim that they have been injured by racially discriminatory acts practiced on others. Thus, their claim of standing under § 1982 must also fail.

Because I think that respondents have no standing to litigate claims under 42 U. S. C. § 1982 and § 812 of the Civil Rights Act of 1968, I would reverse the judgment of the Court of Appeals.

BURCH ET AL. *v.* LOUISIANA

CERTIORARI TO THE SUPREME COURT OF LOUISIANA

No. 78–90. Argued February 22, 1979—Decided April 17, 1979

Held: A conviction by a nonunanimous six-person jury in a state criminal trial for a nonpetty offense, as contemplated by provisions of the Louisiana Constitution and Code of Criminal Procedure that permit a conviction by five out of the six jurors, violates the right of an accused to trial by jury guaranteed by the Sixth and Fourteenth Amendments. Pp. 134–139.

(a) Lines must be drawn somewhere if the substance of the jury trial right is to be preserved, and while this line-drawing process "cannot be wholly satisfactory, for it requires attaching different consequences to events which, when they lie near the line, actually differ very little," *Duncan* v. *Louisiana*, 391 U. S. 145, 161, conviction for a nonpetty offense by only five members of a six-person jury presents a threat to preservation of the substance of the jury trial guarantee and justifies requiring verdicts rendered by such juries to be unanimous. Cf. *Ballew* v. *Georgia*, 435 U. S. 223. Pp. 137–138.

(b) The near-uniform judgment of those States utilizing six-member juries in trials of nonpetty offenses that the verdict must be unanimous to convict, provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not. P. 138.

(c) The State's substantial interest in reducing the time and expense associated with the administration of its system of criminal justice is insufficient justification for its use of nonunanimous six-person juries. Any benefits that might accrue from the use of such juries, as compared with requiring unanimity, are speculative, at best, and, more importantly, when a State has reduced the size of its juries to the minimum number permitted by the Constitution, the additional authorization of nonunanimous verdicts sufficiently threatens the constitutional principles establishing the size threshold that any countervailing interest of the State should yield. Pp. 138–139.

360 So. 2d 831, reversed in part, affirmed in part, and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, POWELL, and STEVENS, JJ., joined. STEVENS, J., filed a concurring opinion, *post*, p. 139. BRENNAN, J., filed

an opinion concurring in part and dissenting in part, in which STEWART and MARSHALL, JJ., joined, *post*, p. 140.

Jack Peebles argued the cause and filed a brief for petitioners.

Louise Korns argued the cause for respondent. With her on the brief were *William J. Guste, Jr.*, Attorney General of Louisiana, and *Harry F. Connick.**

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

The Louisiana Constitution and Code of Criminal Procedure provide that criminal cases in which the punishment imposed may be confinement for a period in excess of six months "shall be tried before a jury of six persons, five of whom must concur to render a verdict." [1] We granted certiorari to decide whether conviction by a nonunanimous six-person jury in a state criminal trial for a nonpetty offense as

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**Leon Friedman* and *Bruce J. Ennis* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging reversal.

[1] Article I, § 17, of the Louisiana Constitution provides:

"A criminal case in which the punishment may be capital shall be tried before a jury of twelve persons, all of whom must concur to render a verdict. A case in which the punishment is necessarily confinement at hard labor shall be tried before a jury of twelve persons, ten of whom must concur to render a verdict. A case in which the punishment may be confinement at hard labor or confinement without hard labor for more than six months shall be tried before a jury of six persons, five of whom must concur to render a verdict. The accused shall have a right to full voir dire examination of prospective jurors and to challenge jurors peremptorily. The number of challenges shall be fixed by law. Except in capital cases, a defendant may knowingly and intelligently waive his right to a trial by jury."

Article 779 (A), La. Code Crim. Proc. Ann. (West Supp. 1979), states:

"A defendant charged with a misdemeanor in which the punishment may be a fine in excess of five hundred dollars or imprisonment for more than six months shall be tried by a jury of six jurors, five of whom must concur to render a verdict."

contemplated by these provisions of Louisiana law violates the rights of an accused to trial by jury guaranteed by the Sixth and Fourteenth Amendments.[2] 439 U. S. 925 (1978).

Petitioners, an individual and a Louisiana corporation, were jointly charged in two counts with the exhibition of two obscene motion pictures.[3] Pursuant to Louisiana law, they were tried before a six-person jury, which found both petitioners guilty as charged. A poll of the jury after verdict indicated that the jury had voted unanimously to convict petitioner Wrestle, Inc.,[4] and had voted 5–1 to convict petitioner Burch. Burch was sentenced to two consecutive 7-month prison terms, which were suspended, and fined $1,000; Wrestle, Inc., was fined $600 on each count.

Petitioners appealed their convictions to the Supreme Court

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[2] The Sixth Amendment provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense."

In *Duncan* v. *Louisiana*, 391 U. S. 145 (1968), the Court held that the right of trial by jury was a fundamental right applicable to the States by virtue of the Fourteenth Amendment.

[3] At the time of petitioners' trial, the maximum penalty prescribed for the crime of obscenity was a fine of not less than $1,000, or imprisonment in the parish prison for not more than one year, or both. La. Rev. Stat. Ann. § 14:106 (G) (West 1974).

[4] Because Wrestle, Inc., was convicted by a unanimous six-person jury, it lacks standing to challenge the constitutionality of the provisions of Louisiana law allowing conviction by a nonunanimous six-member jury. See, *e. g.*, *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U. S. 59, 72 (1978); *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252, 260–261 (1977); *United States* v. *Raines*, 362 U. S. 17, 21 (1960). And in *Williams* v. *Florida*, 399 U. S. 78 (1970), this Court held that conviction by a unanimous six-person jury does not violate an accused's right to trial by jury. Accordingly, Wrestle, Inc., has not been denied its constitutional right to trial by jury.

of Louisiana, where they argued that the provisions of Louisiana law permitting conviction by a nonunanimous six-member jury violated the rights of persons accused of nonpetty criminal offenses to trial by jury guaranteed by the Sixth and Fourteenth Amendments.[5] Though acknowledging that the issue was "close," the court held that conviction by a nonunanimous six-person jury did not offend the Constitution. *State* v. *Wrestle, Inc.*, 360 So. 2d 831, 838 (1978). The court concluded that none of this Court's decisions precluded use of a nonunanimous six-person jury. " 'If 75 percent concurrence (9/12) was enough for a verdict as determined in *Johnson* v. *Louisiana*, 406 U. S. 356 . . . (1972), then requiring 83 percent concurrence (5/6) ought to be within the permissible limits of *Johnson*.' " *Ibid.*, quoting Hargrave, The Declaration of Rights of the Louisiana Constitution of 1974, 35 La. L. Rev. 1, 56 n. 300 (1974). And our recent decision in *Ballew* v. *Georgia*, 435 U. S. 223 (1978), striking down a Georgia law allowing conviction by a unanimous five-person jury in nonpetty criminal cases, was distinguishable in the Louisiana Supreme Court's view:

> "[I]n *Williams* [v. *Florida*, 399 U. S. 78 (1970)] the court held that a six-person jury was of sufficient size to promote adequate group deliberation, to insulate members from outside intimidation, and to provide a representative cross-section of the community. These values, which *Ballew* held a five-person jury is inadequate to serve, are not necessarily defeated because the six-person jury's verdict may be rendered by five instead of by six persons." 360 So. 2d, at 838.

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[5] Although petitioners did not raise the jury trial issue in the trial court, the Louisiana Supreme Court held that under state law it could consider petitioners' claim, and it disposed of that claim. *State* v. *Wrestle, Inc.*, 360 So. 2d 831, 837 (1978). The federal question therefore is properly raised in this Court. See *New Jersey* v. *Portash*, 440 U. S. 450, 455 (1979); *Jenkins* v. *Georgia*, 418 U. S. 153, 157 (1974); *Raley* v. *Ohio*, 360 U. S. 423, 436 (1959).

Since the Louisiana Supreme Court believed that conviction by a nonunanimous six-person jury was not necessarily foreclosed by this Court's decisions, it stated that it preferred to "indulg[e] in the presumption of federal constitutionality which must be afforded to provisions of our state constitution." *Ibid.*

We agree with the Louisiana Supreme Court that the question presented is a "close" one. Nonetheless, we believe that conviction by a nonunanimous six-member jury in a state criminal trial for a nonpetty offense deprives an accused of his constitutional right to trial by jury.

Only in relatively recent years has this Court had to consider the practices of the several States relating to jury size and unanimity. *Duncan* v. *Louisiana,* 391 U. S. 145 (1968), marked the beginning of our involvement with such questions. The Court in *Duncan* held that because trial by jury in "serious" criminal cases is "fundamental to the American scheme of justice" and essential to due process of law, the Fourteenth Amendment guarantees a state criminal defendant the right to a jury trial in any case which, if tried in a federal court, would require a jury under the Sixth Amendment. *Id.,* at 149, 158–159.[6]

Two Terms later in *Williams* v. *Florida,* 399 U. S. 78, 86 (1970), the Court held that this constitutional guarantee of trial by jury did not require a State to provide an accused with a jury of 12 members and that Florida did not violate

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[6] In *Duncan* v. *Louisiana, supra,* at 159, the Court reaffirmed the long-established view that "petty offenses" may be tried without a jury, and in *Baldwin* v. *New York,* 399 U. S. 66, 69 (1970), the plurality opinion of Mr. Justice White concluded that "no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized." See *Ballew* v. *Georgia,* 435 U. S. 223, 229 (1978) (opinion of Blackmun, J.). Because the Louisiana obscenity statute under which petitioners were charged authorized imprisonment for more than six months, see n. 3, *supra,* petitioners were entitled under the Constitution to be tried by a jury.

the jury trial rights of criminal defendants charged with nonpetty offenses by affording them jury panels comprised of only 6 persons. After canvassing the common-law development of the jury and the constitutional history of the jury trial right, the Court concluded that the 12-person requirement was "a historical accident" and that there was no indication that the Framers intended to preserve in the Constitution the features of the jury system as it existed at common law. *Id.*, at 89–90. Thus freed from strictly historical considerations, the Court turned to examine the function that this particular feature performs and its relation to the purposes of jury trial. *Id.*, at 99–100. The purpose of trial by jury, as noted in *Duncan*, is to prevent government oppression by providing a "safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." 391 U. S., at 156. Given this purpose, the *Williams* Court observed that the jury's essential feature lies in the "interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence." 399 U. S., at 100. These purposes could be fulfilled, the Court believed, so long as the jury was of a sufficient size to promote group deliberation, free from outside intimidation, and to provide a fair possibility that a cross section of the community would be represented on it. *Ibid.* The Court concluded, however, that there is "little reason to think that these goals are in any meaningful sense less likely to be achieved when the jury numbers six, than when it numbers 12—*particularly if the requirement of unanimity is retained.*" *Ibid.* (emphasis added).[7]

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[7] The Court also believed that a jury of 12 was neither more reliable as a factfinder, more advantageous to the defendant, nor more representative of the variety of viewpoints in the community than a jury of 6. 399 U. S., at 100–102.

A similar analysis led us to conclude in 1972 that a jury's verdict need not be unanimous to satisfy constitutional requirements, even though unanimity had been the rule at common law. Thus, in *Apodaca* v. *Oregon*, 406 U. S. 404 (1972), we upheld a state statute providing that only 10 members of a 12-person jury need concur to render a verdict in certain noncapital cases.[8] In terms of the role of the jury as a safeguard against oppression, the plurality opinion perceived no difference between those juries required to act unanimously and those permitted to act by votes of 10 to 2. 406 U. S., at 411. Nor was unanimity viewed by the plurality as contributing materially to the exercise of the jury's common-sense judgment or as a necessary precondition to effective application of the requirement that jury panels represent a fair cross section of the community. *Id.*, at 410, 412.[9]

Last Term, in *Ballew* v. *Georgia*, 435 U. S. 223 (1978), we considered whether a jury of less than six members passes constitutional scrutiny, a question that was explicitly reserved in *Williams* v. *Florida*. See 399 U. S., at 91 n. 28. The Court, in separate opinions, held that conviction by a unanimous five-person jury in a trial for a nonpetty offense deprives an accused of his right to trial by jury. While readily

[8] *Johnson* v. *Louisiana*, 406 U. S. 356 (1972), was decided the same day as *Apodaca* v. *Oregon* and held that conviction by a 9–3 verdict in certain noncapital cases did not violate the Due Process Clause for failure to satisfy the reasonable-doubt standard. Unlike *Apodaca*, *Johnson* involved a trial held prior to *Duncan* v. *Louisiana*, 391 U. S. 145 (1968), which the Court in *DeStefano* v. *Woods*, 392 U. S. 631 (1968), held was not to be applied retroactively, and therefore did not implicate the Sixth Amendment as applied to the States through the Fourteenth. 406 U. S., at 358.

[9] Mr. Justice Powell concurred in the judgment in *Apodaca* v. *Oregon*, 406 U. S., at 366. He concluded that although Sixth Amendment history and precedent required jury unanimity in federal trials, the Due Process Clause of the Fourteenth Amendment does not incorporate all the elements of a jury trial required by the Sixth Amendment and does not prevent Oregon from permitting conviction by a verdict of 10–2. *Id.*, at 369–380.

admitting that the line between six members and five was not altogether easy to justify, at least five Members of the Court believed that reducing a jury to five persons in nonpetty cases raised sufficiently substantial doubts as to the fairness of the proceeding and proper functioning of the jury to warrant drawing the line at six. See 435 U. S., at 239 (opinion of BLACKMUN, J.); *id.*, at 245–246 (opinion of POWELL, J.).[10]

We thus have held that the Constitution permits juries of less than 12 members, but that it requires at least 6. *Ballew* v. *Georgia, supra; William* v. *Florida, supra.* And we have approved the use of certain nonunanimous verdicts in cases involving 12-person juries. *Apodaca* v. *Oregon, supra* (10–2); *Johnson* v. *Louisiana,* 406 U. S. 356 (1972) (9–3). These principles are not questioned here. Rather, this case lies at the intersection of our decisions concerning jury size and unanimity. As in *Ballew,* we do not pretend the ability to discern *a priori* a bright line below which the number of jurors participating in the trial or in the verdict would not permit the jury to function in the manner required by our prior cases. 435 U. S., at 231–232 (opinion of BLACKMUN, J.); *id.*, at 245–246 (opinion of POWELL, J.); see *Williams* v. *Florida, supra,* at 100. But having already departed from the strictly historical requirements of jury trial, it is inevitable that lines must be drawn somewhere if the substance of the jury trial right is to be preserved. Cf. *Scott* v. *Illinois,* 440 U. S. 367, 372 (1979); *Baldwin* v. *New York,* 399 U. S. 66, 72–73 (1970) (plurality opinion); *Duncan* v. *Louisiana,* 391 U. S., at 161. Even the State concedes as much. Tr. of Oral Arg. 26–27.

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[10] MR. JUSTICE WHITE concurred in the judgment on the ground that a jury of fewer than six persons would not satisfy the fair-cross-section requirement of the Sixth and Fourteenth Amendments. *Ballew* v. *Georgia,* 435 U. S., at 245. See also *id.*, at 246 (opinion of BRENNAN, J., joining opinion of BLACKMUN, J., insofar as it holds that the Sixth and Fourteenth Amendments require juries in criminal trials to contain more than five persons).

This line-drawing process, "although essential, cannot be wholly satisfactory, for it requires attaching different consequences to events which, when they lie near the line, actually differ very little." *Duncan* v. *Louisiana, supra,* at 161; see *Baldwin* v. *New York, supra,* at 72–73 (plurality opinion). However, much the same reasons that led us in *Ballew* to decide that use of a five-member jury threatened the fairness of the proceeding and the proper role of the jury, lead us to conclude now that conviction for a nonpetty offense by only five members of a six-person jury presents a similar threat to preservation of the substance of the jury trial guarantee and justifies our requiring verdicts rendered by six-person juries to be unanimous.[11] We are buttressed in this view by the current jury practices of the several States. It appears that of those States that utilize six-member juries in trials of nonpetty offenses, only two, including Louisiana, also allow nonunanimous verdicts.[12] We think that this near-uniform judgment of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not. See *Baldwin* v. *New York, supra,* at 70–72 (plurality opinion); *Duncan* v. *Louisiana, supra,* at 161; *District of Columbia* v. *Clawans,* 300 U. S. 617, 628 (1937).

The State seeks to justify its use of nonunanimous six-

[11] We, of course, intimate no view as to the constitutionality of nonunanimous verdicts rendered by juries comprised of more than six members.

[12] Of the 25 States that apparently allow six-person juries in the trials of at least some nonpetty cases, only Louisiana and Oklahoma appear to permit a verdict to be rendered by a less than unanimous jury. See La. Const., Art. I, § 17; La. Code Crim. Proc. Ann., Art. 779 (A) (West Supp. 1979); Okla. Const., Art. 2, § 19; Okla. Stat., Tit. 22, § 601 (1971); *Houchin* v. *State,* 97 Okla. Cr. 268, 262 P. 2d 173 (1953); *Pierce* v. *State,* 96 Okla. Cr. 76, 248 P. 2d 633 (1952). The Constitution of the State of Idaho allows, but does not require, nonunanimous six-person juries in certain circumstances; however, the Idaho criminal rules appear to require verdicts of six-person juries to be unanimous. See Idaho Const., Art. I, § 7; Idaho Rule Crim. Proc. 31 (a).

person juries on the basis of the "considerable time" savings that it claims results from trying cases in this manner. It asserts that under its system, juror deliberation time is shortened and the number of hung juries is reduced. Brief for Respondent 14. Undoubtedly, the State has a substantial interest in reducing the time and expense associated with the administration of its system of criminal justice. But that interest cannot prevail here. First, on this record, any benefits that might accrue by allowing five members of a six-person jury to render a verdict, as compared with requiring unanimity of a six-member jury, are speculative, at best. More importantly, we think that when a State has reduced the size of its juries to the minimum number of jurors permitted by the Constitution, the additional authorization of nonunanimous verdicts by such juries sufficiently threatens the constitutional principles that led to the establishment of the size threshold that any countervailing interest of the State should yield.

The judgment of the Louisiana Supreme Court affirming the conviction of petitioner Burch is, therefore, reversed, and its judgment affirming the conviction of petitioner Wrestle, Inc., is affirmed. The case is remanded to the Louisiana Supreme Court for proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE STEVENS, concurring.

Even though I have not changed the views I expressed in *Marks* v. *United States,* 430 U. S. 188, 198; *Smith* v. *United States,* 431 U. S. 291, 311–321; and *Splawn* v. *California,* 431 U. S. 595, 602–605, I do not believe that I have the authority to vote to modify the judgment below on a ground not fairly subsumed within the question presented by the petition for certiorari.* That question is whether conviction by a non-

*See this Court's Rule 23 (1)(c) ("Only the questions set forth in the petition or fairly comprised therein will be considered by the court");

unanimous six-person jury of a nonpetty offense violates the Sixth and Fourteenth Amendments. Because this is the only question addressed by the Court and because I agree with the Court's resolution of this question, I join its opinion.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, concurring in part and dissenting in part.

For the reasons set forth in *Johnson* v. *Louisiana*, 406 U. S. 356, 380 (Douglas, J., dissenting), 395 (BRENNAN, J., dissenting), 397 (STEWART, J., dissenting), 399 (MARSHALL, J., dissenting) (1972), and *Apodaca* v. *Oregon*, 406 U. S. 404, 414 (1972) (STEWART, J., dissenting), I agree that petitioner Burch's criminal conviction by a nonunanimous jury verdict must be reversed as a violation of his right to jury trial guaranteed by the Sixth and Fourteenth Amendments. However, I dissent from the Court's disposition insofar as it authorizes a retrial of petitioner Burch and affirms the conviction of petitioner Wrestle, Inc. Petitioners were convicted on charges of exhibiting allegedly obscene motion pictures in violation of La. Rev. Stat. Ann. § 14:106 (A)(3) (West 1974). That statute in my view is overbroad and therefore facially unconstitutional. See *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 73 (1973) (BRENNAN, J., dissenting). Accordingly, I would reverse the convictions of both petitioners and declare that the unconstitutionality of the statute precludes a constitutional conviction of either for its alleged violation. See *Ballew* v. *Georgia*, 435 U. S. 223, 246 (1978) (opinion of BRENNAN, J.).

Mazer v. *Stein*, 347 U. S. 201, 208, and n. 6; *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, 177–179.

Syllabus

ARIZONA PUBLIC SERVICE CO. ET AL. *v.* SNEAD, DIRECTOR OF REVENUE DIVISION, TAXATION AND REVENUE DEPARTMENT OF NEW MEXICO, ET AL.

APPEAL FROM THE SUPREME COURT OF NEW MEXICO

No. 77-1810. Argued February 26, 1979—Decided April 18, 1979

New Mexico has imposed an energy tax on the privilege of generating electricity within the State. This tax applies to all utility companies generating electricity within the State and may be credited against the New Mexico gross receipts tax liability for electricity sold at retail within New Mexico. But where the electricity is transmitted to other States for sale and consumption, there is no gross receipts tax liability against which to offset energy tax liability. A federal statute, 15 U. S. C. § 391, prohibits a State from imposing a tax on the generation or transmission of electricity which discriminates against out-of-state consumers, and further provides that a tax is discriminatory if it "results, either directly or indirectly, in a greater tax burden on electricity" generated and transmitted in interstate commerce than on electricity generated and transmitted in intrastate commerce. Appellant utility companies, owners of New Mexico power plants at which most of the electricity generated is ultimately sold to out-of-state consumers, brought action in a New Mexico state court seeking to have the energy tax invalidated on the ground, *inter alia*, that it violated the federal statute, but the New Mexico Supreme Court, affirming the trial court, upheld the tax.

Held: The New Mexico energy tax is invalid under the Supremacy Clause by reason of the federal statute. Because the tax *itself*, through operation of the tax-credit provisions, indirectly but necessarily discriminates against electricity sold outside New Mexico, it violates that statute. The federal statute does not exceed the permissible bounds of congressional action under the Commerce Clause, since Congress had a rational basis for finding that a tax such as New Mexico's interfered with interstate commerce, and selected a reasonable method to eliminate that interference. Pp. 146–151.

91 N. M. 485, 576 P. 2d 291, reversed.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined.

REHNQUIST, J., filed an opinion concurring in the judgment, in which WHITE, J., joined, *post*, p. 151.

Daniel J. McAuliffe argued the cause for appellants. With him on the briefs were *Richard N. Carpenter, Mark Wilmer,* and *William C. Schaab.*

Jan E. Unna, Special Assistant Attorney General of New Mexico, argued the cause for appellees. With him on the brief were *Toney Anaya,* Attorney General, and *John P. Frank.**

MR. JUSTICE STEWART delivered the opinion of the Court.

New Mexico has imposed a tax on the privilege of generating electricity within its borders. The question in this case is whether that tax conflicts with federal law, statutory or constitutional.

I

The Four Corners power plants, located in New Mexico's desert northwest, are owned by the appellants, five public utilities companies.[1] Most of the electricity generated at the plants is ultimately sold to out-of-state consumers.[2] New

*A brief of *amici curiae* urging reversal was filed by the Attorneys General for their respective States as follows: *Louis J. Lefkowitz* for New York, *Francis B. Burch* for Maryland, *John Degnan* for New Jersey, *William J. Brown* for Ohio, and *Marshall Coleman* for Virginia.

[1] The five appellants are Arizona Public Service Co., El Paso Electric Co., Salt River Project Agricultural Improvement & Power Dist., Southern California Edison Co., and Tucson Gas & Electric Co. Each appellant owns an undivided interest in the Four Corners Power Plant. Tucson Gas & Electric is an equal co-owner with Public Service Co. of New Mexico of units of the San Juan Generating Station. El Paso Electric Co. owns and operates the Rio Grande Generating Station in southern New Mexico.

[2] Arizona Public Service Co. makes some minor retail sales of electricity in New Mexico. El Paso Electric makes retail sales in a significant portion of southern New Mexico and is the only one of the appellants regulated

Mexico imposes a 4% gross receipts tax on retail sellers of electricity,[3] but since the bulk of the appellants' sales are made to consumers in other States, they do not incur significant liability for this tax. In 1975, New Mexico enacted the Electrical Energy Tax Act, the law at issue in this case.[4] That Act imposes a tax on the privilege of generating electricity at the rate of $\frac{4}{10}$ of a mill on each net kilowatt hour of electricity generated. This is roughly equivalent to a 2% tax on the retail value of the electricity. The tax is imposed on *all* companies generating electricity within the State. Section 9 of the Act, however, provides that this electrical energy tax may be fully credited against the company's gross receipts tax liability.

The Act and the regulations implementing it insure that the electrical generating company will receive full credit for the

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by New Mexico as a public utility. El Paso Electric also sells electricity at wholesale in the Republic of Mexico. In 1975, the five appellants generated nearly a billion kilowatt hours of electricity in New Mexico.

[3] N. M. Stat. Ann. §§ 7–9–1 through 7–9–80 (1978).

[4] The critical sections of the Electrical Energy Tax Act are §§ 3 and 9. They provide in relevant part as follows:

Section 3.

"A. For the privilege of generating electricity in this state for the purpose of sale, whether the sale takes place in this state or outside this state, there is imposed on any person generating electricity a temporary tax, applicable until July 1, 1984, of four-tenths of one mill ($.0004) on each net kilowatt hour of electricity generated in New Mexico.

"B. The tax imposed by this section shall be referred to as the 'electrical energy tax.'" N. M. Stat. Ann. § 7–18–3 (1978).

Section 9.

"B. On electricity generated inside this state and consumed in this state which was subject to the electrical energy tax, the amount of such tax paid may be credited against the gross receipts tax due this state.

"C. The credit under Subsections A or B of this section shall be assigned to the person selling the electricity for consumption in New Mexico on which New Mexico gross receipts tax is due, and the assignee shall reimburse the assignor for the credit." N. M. Stat. Ann. § 7–9–80 (1978).

tax even if it does not itself make retail sales of electricity. This result is accomplished by requiring the generating company to assign its "potential credit" to the retailer, who in turn is required to reimburse the generating company for the value of this credit.[5] The consequence is that a generating

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[5] The relevant sections of the regulations provide:

"B. Section 72–16A–16.1 (C) [now codified as § 7–9–80 (C)] requires that a potential credit be assigned to persons purchasing electricity for resale:

"1) to buyers who will potentially consume or use the electricity in New Mexico, or

"2) to buyers who will potentially resell the electricity for consumption in New Mexico; on which an electrical energy tax or similar tax has been levied by New Mexico, by another state or by political subdivisions thereof and paid by the seller.

"Each seller of electricity as described in this paragraph must assign, to each buyer described in subparagraphs (1) and (2) of this paragraph, a pro-rata share of the total available potential credit provided in Section 72–16A–16.1 (A) or (B) [now codified as §§ 7–9–80 (A), 7–9–80 (B)].

"C. It shall be presumed that the potential credit against gross receipts tax as provided by Section 72–16A–16.1 (C) shall have been assigned when the buyer is in receipt of an invoice from the seller separately stating the amount of the applicable Electrical Energy Tax or similar tax as provided in Section 72–16A–16.1.

"In the absence of bad faith, a wholesale purchaser in New Mexico of electricity may rely upon such an invoice in claiming a credit under Section 72–16A–16.1.

"D.

"1) That portion of the potential credit assigned to a buyer further reselling the electricity for consumption in New Mexico may be credited by the assignee against the gross receipts tax due New Mexico on receipts from the sale of electricity for any month subsequent to July 1, 1975.

"2) That portion of the potential credit assigned to a buyer further reselling the electricity at wholesale to buyers who will resell the electricity for consumption in New Mexico must be reassigned to the subsequent buyer as provided in paragraph B of this regulation.

"3) That amount of the electric energy tax credit which is not assigned to appropriate buyers and which is otherwise creditable under Section 72–

company's 2% tax is completely offset by the credit against the 4% retail sales tax when its electricity is sold within New Mexico. But to the extent that the electricity generated in New Mexico is not sold at retail in the State, there is no gross receipts tax liability against which to offset the electrical energy tax liability of the generating company.

In 1976, the State of Arizona, as a consumer of electricity and *parens patriae* for its citizens, sought to invoke this Court's original jurisdiction by a motion for leave to file a bill of complaint against New Mexico, asking for a declaratory judgment invalidating this New Mexico tax. The litigation now before us had already been initiated in the New Mexico courts by the present appellants, seeking essentially the same relief. This Court denied Arizona leave to file its complaint, concluding:

> "[T]he pending state-court action provides an appropriate forum in which the *issues* tendered here may be litigated. If on appeal the New Mexico Supreme Court should hold the electrical energy tax unconstitutional, Arizona will have been vindicated. If, on the other hand, the tax is held to be constitutional, the issues raised now may be brought to this Court by way of direct appeal under 28 U. S. C. § 1257 (2)." *Arizona* v. *New Mexico,* 425 U. S. 794, 797.

One of the alternative scenarios foreseen in our 1976 opinion has now eventuated. The New Mexico Supreme Court has upheld the validity of this energy tax against federal statutory and constitutional attacks, *Arizona Public Serv. Co.* v. *O'Chesky,* 91 N. M. 485, 576 P. 2d 291, and the issues have been brought to this Court by way of direct appeal under 28 U. S. C. § 1257 (2). 439 U. S. 891.

16A–16.1, may be credited against the gross receipts tax due New Mexico on receipts from the sale of electricity for any reporting month subsequent to July 1, 1975." N. M. G. Rev. Regulations 16.1:1 (1976).

II

The appellants contend that the New Mexico tax is invalid under a specific federal statute as well as under the Commerce, Due Process, and Import-Export Clauses of the Constitution. Because we conclude that under the Supremacy Clause [6] the tax is invalid by reason of this federal statute, we do not reach the substantive constitutional issues.

When Congress enacted the Tax Reform Act of 1976 it included a provision relating to state taxes on electricity. Section 2121 (a) of the Act, 90 Stat. 1914, codified at 15 U. S. C. § 391, provides:

> "No State, or political subdivision thereof, may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity. For purposes of this section, a tax is discriminatory if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce."

This provision was not in the bill as passed by the House of Representatives. Its genesis was in the Senate Finance Committee, although in its original version the definition of a discriminatory tax was different from that in the law finally enacted:

> "For purposes of this section a tax is discriminatory that either directly or indirectly results in the payment of a higher gross or net tax on electricity which is generated and transmitted in interstate commerce than on elec-

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[6] "[T]he Laws of the United States which shall be made in Pursuance [of the Constitution] . . . shall be the supreme Law of the Land . . . ." U. S. Const., Art. VI, cl. 2.

tricity which is generated and transmitted in intrastate commerce." H. R. 10612, 94th Cong., 1st Sess., § 1323 (1976).

The Committee's Report described the reasons for including the provision:

"The committee has learned that one State places a discriminatory tax upon the production of electricity within its boundaries for consumption outside its boundaries. While the rate of the tax itself is identical for electricity that is ultimately consumed outside the State and electricity which is consumed inside the State, discrimination results because the State allows the amount of the tax to be credited against its gross receipts tax if the electricity is consumed within its boundaries. This credit normally benefits only domiciliaries of the taxing State since no credit is allowed for electricity produced within the State and consumed outside the State. As a result, the cost of the electricity to nondomiciliaries is normally increased by the cost the producer of the electricity must bear in paying the tax. However, the cost to domiciliaries of the taxing State does not include the amount of the tax.

"The committee believes that this is an example of discriminatory State taxation which is properly within the ability of Congress to prohibit through its power to regulate interstate commerce." (Footnote omitted.) S. Rep. No. 94–938, pt. I, pp. 437–438 (1976).

The identity of the unnamed State was disclosed during the course of a subsequent Senate floor debate on a motion by Senator Domenici of New Mexico to strike the provision from the bill. Senators Domenici and Montoya of New Mexico, Senators Fannin and Goldwater of Arizona, and Senator Cranston of California made it clear that the provision was aimed directly at New Mexico's electrical energy tax. 122

Cong. Rec. 24324–24329 (1976). At the conclusion of this debate, Senator Domenici's motion to eliminate the provision was defeated. *Id.*, at 24329.

The appellees concede that this statutory provision was aimed directly at the New Mexico Electrical Energy Tax Act. They contend, however, that the definition of a discriminatory tax was so defused in the Conference Committee that Congress in the law as enacted failed to hit its mark. Specifically, they point out that a discriminatory tax, defined in the Senate Committee's original draft as one that results in "the payment of a higher gross or net tax," became in the statute as enacted one which results in "a greater tax burden" on electricity transmitted out of state than that sold within the State.

We are told that the statutory definition was redrafted in the Conference Committee to allay the concerns of Senators from States with somewhat similar taxes. That Committee's Report gave no reason, however, for the change in language. The Report merely stated:

> "*Senate amendment.*—Under present law, any restrictions on the power of States or their political subdivisions to tax goods or services produced in the taxing State for nondomiciliary use outside the taxing State are derived from court interpretations of the interstate commerce clause of the Constitution.
>
> "The Senate amendment prohibits any State or political subdivision of a State from directly or indirectly imposing any tax on the generation or transmission of electricity which discriminates against out-of-State users. This provision is effective for taxable years beginning after June 30, 1974.
>
> "*Conference agreement.*—The conference agreement follows the Senate amendment." H. R. Conf. Rep. No. 94–1515, p. 503 (1976).

There is thus no legislative history to show what the Conference Committee's drafting change was intended to accom-

plish. But the provision as enacted is far from the "sterile" legislation that the appellees contend it is. To the contrary, the provision clearly operates, we think, to carry out the expressed intent of the Senate to invalidate the New Mexico tax.

The Act prohibits "a tax on or with respect to the generation or transmission of electricity" which "results, either directly or indirectly, in a greater tax burden on electricity" consumed outside of New Mexico than that consumed in the State. The appellees urge that this statutory provision is no more than a prohibition of a tax that is invalid under the constitutional test of the Commerce Clause. That test, they say, requires examination of New Mexico's total tax structure to determine whether the State in fact imposes a greater tax burden on electricity sent out of state. See *Halliburton Oil Well Cementing Co.* v. *Reily*, 373 U. S. 64, 69. And the tax in question, they say, clearly survives such an examination. Power sold within New Mexico, they argue, is subject to a 4% tax: 2% from the electrical energy tax and 2% from the gross receipts tax. By contrast, New Mexico subjects electricity sent out of state only to its 2% generation tax. The appellees contend, therefore, that if there is any discrimination in New Mexico's taxing structure, it is discrimination against electricity consumed within the State.

But, whatever the validity may be of the Commerce Clause test advanced by the appellees, the federal statutory provision is directed specifically at a state tax "on or with respect to the generation or transmission of electricity," not to the entire tax structure of the State. The tax imposed by New Mexico's Electrical Energy Tax Act is concededly a tax on the generation of electricity. The tax-credit provisions of the Act itself insure that locally consumed electricity is subject to *no* tax burden from the electrical energy tax, while the bulk of the electricity generated in New Mexico by the appellants is subject to a 2% tax, since it is sold outside the State. To look

narrowly to the type of tax the federal statute names, rather than to consider the entire tax structure of the State, is to be faithful not only to the language of that statute but also to the expressed intent of Congress in enacting it. Because the electrical energy tax *itself* indirectly but necessarily discriminates against electricity sold outside New Mexico, it violates the federal statute.[7]

The appellees also argue that if the federal statute is construed to invalidate the New Mexico tax, it exceeds the permissible bounds of congressional action under the Commerce Clause. In view of the broad power of Congress to regulate interstate commerce, this argument must be rejected. See *Wickard* v. *Filburn*, 317 U. S. 111; *Katzenbach* v. *McClung*, 379 U. S. 294. Here, the Congress had a rational basis for finding that the New Mexico tax interfered with interstate commerce, and selected a reasonable method to eliminate that interference. The legislation thus was within the constitutional power of Congress to enact. See *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U. S. 241, 258–259; *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110, 119.

The generation of electricity in the Four Corners region undoubtedly also generates environmental and other problems for New Mexico. There is no indication that Congress intended to prevent the State from taxing the generation of

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[7] This is not a case where the State has imposed an evenhanded tax on the generation of electricity *and* has lowered the gross receipts or sales tax on the sale of electricity. Although New Mexico argues that such is the practical result of its tax structure, the credit provisions of the Electrical Energy Tax Act itself shift the legal incidence of the gross receipts tax credit directly to the generating utility.

The *amici* in this case have pointed to several similar state taxes on the generation of electricity. Pa. Stat. Ann., Tit. 72, § 8101 (Purdon Supp. 1978–1979); Wash. Rev. Code §§ 82.16.020, 82.16.050 (1976); W. Va. Code §§ 11–13–2d, 11–13–2m (Supp. 1978). None of these States, however, has adopted precisely the scheme used by New Mexico, and we express no opinion as to the validity of these or any other state tax laws.

electricity to pay for solutions to these problems. But the generation of electricity to be sent to Phoenix causes no more problems than the generation of electricity to be sent to Albuquerque. Congress required only that New Mexico, if it chooses to tax the generation of electricity for consumption in either city, tax it equally for each.

The judgment is reversed.

It is so ordered.

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE WHITE joins, concurring in the judgment.

I concur in the judgment of the Court because I agree that the tax imposed by New Mexico's Electrical Energy Tax Act on the generation of electricity within its borders is forbidden by § 2121 (a) of the Tax Reform Act of 1976, codified at 15 U. S. C. § 391.

I think that the statutory question is somewhat closer than the Court intimates, both as to the meaning of the actual language of § 391 and as to its legislative history. As the Court indicates and as appellees concede, the debate on the floor of the Senate makes it clear that the original version of § 391 was aimed at New Mexico's energy tax. See *ante*, at 147–148; Brief for Appellees 14. New Mexico argues here that the original provision was redrafted in conference in order to "save" somewhat similar tax statutes in other States and that, as redrafted, § 391 is "sterile" legislation: It accomplishes no more than the Commerce Clause of the Constitution would accomplish of its own force. See *ante*, at 149; Brief for Appellees 11, 16, 24. Congress is vested with the legislative power of the United States, and not the judicial power, and therefore it may be unrealistic to assume automatically that Congress never passes a "sterile" law, in the sense that the provision does no more than the Constitution would have done had Congress never enacted the law. But, in my view, the laws enacted by Congress certainly are entitled to a presumption

to that effect. Since the effect of § 391 is not entirely clear from its language and legislative history, I would give some weight to that presumption in reaching the conclusion that § 391 extends beyond the requirements of the Commerce Clause* and outlaws the New Mexico energy tax here at issue.

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*There is no question in my mind that if § 391 were coextensive with the Commerce Clause, New Mexico's energy tax would be valid for substantially the same reasons advanced by appellees. *Ante*, at 149; see *Halliburton Oil Well Cementing Co.* v. *Reily*, 373 U. S. 64, 69–70 (1963); *Gregg Dyeing Co.* v. *Query*, 286 U. S. 472, 480 (1932); *Public Utility Dist. No. 2* v. *State*, 82 Wash. 2d 232, 239–240, 510 P. 2d 206, 210–211, appeal dismissed for want of substantial federal question, 414 U. S. 1106 (1973).

HERBERT *v.* LANDO ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 77–1105. Argued October 31, 1978—Decided April 18, 1979

Petitioner instituted a diversity action in Federal District Court against the respondents, a television network and two of its employees, and a magazine, alleging that a program aired by the network and an article published by the magazine defamed him. Petitioner conceded that because he was a "public figure" the First and Fourteenth Amendments precluded recovery absent proof that respondents had published damaging falsehoods with "actual malice"—that is, with knowledge that the statements were false or with reckless disregard of whether they were false or not. See *New York Times Co.* v. *Sullivan*, 376 U. S. 254, and subsequent decisions of this Court. Preparing to prove his case in light of these requirements, petitioner deposed one of the network employees at length and sought an order to compel answers to a variety of questions to which response was refused on the ground that the First Amendment protected against inquiry into the state of mind of those who edit, produce, or publish, and into the editorial process. The District Court ruled that the questions were relevant and rejected the claim of constitutional privilege. A divided panel of the Court of Appeals reversed, two judges concluding that the First Amendment lent sufficient protection to the editorial processes to protect the network employee from inquiry about his thoughts, opinions, and conclusions with respect to the material gathered by him and about his conversations with his editorial colleagues.

Held: When a member of the press is alleged to have circulated damaging falsehoods and is sued for injury to the plaintiff's reputation, there is no privilege under the First Amendment's guarantees of freedom of speech and freedom of the press barring the plaintiff from inquiring into the editorial processes of those responsible for the publication where the inquiry will produce evidence material to the proof of a critical element of the plaintiff's cause of action. Pp. 158–177.

(a) Contrary to the views of the Court of Appeals, according an absolute privilege to the editorial process of a media defendant in a libel case is not required, authorized, or presaged by this Court's prior cases, and would substantially enhance the burden of proving actual malice, contrary to the expectations of *New York Times Co.* v. *Sullivan*,

supra; Curtis Publishing Co. v. *Butts*, 388 U. S. 130, and similar cases. *New York Times* and its progeny do not suggest any First Amendment restriction on the sources from which the plaintiff can obtain the necessary evidence to prove the critical elements of his cause of action, but, on the contrary, make it essential to proving liability that the plaintiff focus on the defendant's conduct and state of mind. It is also untenable to conclude from the prior cases that although proof of the necessary state of mind can be in the form of objective circumstances from which the ultimate fact can be inferred, plaintiffs may not inquire directly from the defendants whether they knew or suspected that their damaging publication was in error. Pp. 158–169.

(b) The case for modifying firmly established constitutional doctrine by placing beyond the plaintiff's reach a range of direct evidence relevant to proving knowing or reckless falsehood by the publisher of an alleged libel, elements that are critical to a plaintiff such as petitioner, is by no means clear and convincing. The suggested privilege for the editorial process would constitute a substantial interference with the ability of a defamation plaintiff to establish the ingredients of malice as required by *New York Times*, and furthermore the outer boundaries of the suggested editorial privilege are difficult to perceive. The important interests of petitioner and other defamation plaintiffs at stake in opposing the creation of the asserted privilege cannot be overridden on the ground that requiring disclosure of editorial conversations and of a reporter's conclusions about veracity of the material he has gathered will have an intolerable chilling effect on the editorial process and editorial decisionmaking. If the claimed inhibition flows from the fear of damages liability for publishing knowing or reckless falsehoods, those effects are precisely those that have been held to be consistent with the First Amendment. Pp. 169–175.

(c) Creating a constitutional privilege foreclosing direct inquiry into the editorial process would not cure the press' problem as to escalating costs and other burdens incident to defamation litigation. Only complete immunity from liability for defamation would effect this result, and this Court has regularly found this to be an untenable construction of the First Amendment. Furthermore, mushrooming litigation costs, much of it due to pretrial discovery, are not peculiar to the libel and slander area. Until and unless there are major changes in the present Federal Rules of Civil Procedure, reliance must be had on what in fact and in law are ample powers of the district judge to prevent abuse. Pp. 175–177.

568 F. 2d 974, reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, REHNQUIST, and STEVENS, JJ., joined. POWELL, J., filed a concurring opinion, *post*, p. 177. BRENNAN, J., filed an opinion dissenting in part, *post*, p. 180. STEWART, J., *post*, p. 199, and MARSHALL, J., *post*, p. 202, filed dissenting opinions.

Jonathan W. Lubell argued the cause for petitioner. With him on the briefs was *Mary K. O'Melveny*.

Floyd Abrams argued the cause for respondents. With him on the brief were *Dean Ringel, Kenneth M. Vittor, Carleton G. Eldridge, Jr.*, and *Richard G. Green*.*

MR. JUSTICE WHITE delivered the opinion of the Court.

By virtue of the First and Fourteenth Amendments, neither the Federal nor a State Government may make any law "abridging the freedom of speech, or of the press . . . ." The question here is whether those Amendments should be construed to provide further protection for the press when sued for defamation than has hitherto been recognized. More specifically, we are urged to hold for the first time that when a member of the press is alleged to have circulated damaging falsehoods and is sued for injury to the plaintiff's reputation, the plaintiff is barred from inquiring into the editorial processes of those responsible for the publication, even though the inquiry would produce evidence material to the proof of a critical element of his cause of action.

I

Petitioner, Anthony Herbert, is a retired Army officer who had extended wartime service in Vietnam and who received

*Briefs of *amici curiae* urging affirmance were filed by *Arthur B. Hanson* and *Frank M. Northam* for the American Newspaper Publishers Assn.; and by *Dan Paul, Parker D. Thomson, Susan B. Werth, Alan R. Finberg, Corydon B. Dunham, Edgar A. Zingman, Richard M. Schmidt, Jr., Samuel E. Klein, J. Laurent Scharff, Robert C. Lobdell, Erwin G. Krasnow, Robert D. Sack, Gary G. Gerlach, Paul E. Kritzer, James A. Strain*, and *Robert Haydock* for New York Times Co. et al.

widespread media attention in 1969–1970 when he accused his superior officers of covering up reports of atrocities and other war crimes. Three years later, on February 4, 1973, respondent Columbia Broadcasting System, Inc. (CBS), broadcast a report on petitioner and his accusations. The program was produced and edited by respondent Barry Lando and was narrated by respondent Mike Wallace. Lando later published a related article in Atlantic Monthly magazine. Herbert then sued Lando, Wallace, CBS, and Atlantic Monthly for defamation in Federal District Court, basing jurisdiction on diversity of citizenship. In his complaint, Herbert alleged that the program and article falsely and maliciously portrayed him as a liar and a person who had made war-crimes charges to explain his relief from command, and he requested substantial damages for injury to his reputation and to the literary value of a book he had just published recounting his experiences.

Although his cause of action arose under New York State defamation law, Herbert conceded that because he was a "public figure" the First and Fourteenth Amendments precluded recovery absent proof that respondents had published a damaging falsehood "with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." This was the holding of *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 280 (1964), with respect to alleged libels of public officials, and extended to "public figures" by *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130 (1967).[1] Under this rule, absent knowing falsehood, liability requires proof of reckless disregard for truth, that is, that the defendant "in fact entertained serious doubts as to the truth of his publication." *St. Amant* v. *Thompson*, 390 U. S. 727, 731 (1968). Such "subjective awareness of probable falsity," *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 335 n. 6 (1974), may be found if "there are obvious reasons to doubt

[1] Criminal libel prosecutions are subject to the same constitutional limitations. *Garrison* v. *Louisiana*, 379 U. S. 64 (1964).

the veracity of the informant or the accuracy of his reports." *St. Amant* v. *Thompson, supra,* at 732.

In preparing to prove his case in light of these requirements, Herbert deposed Lando at length and sought an order to compel answers to a variety of questions to which response was refused on the ground that the First Amendment protected against inquiry into the state of mind of those who edit, produce, or publish, and into the editorial process.[2] Applying the standard of Fed. Rule Civ. Proc. 26 (b), which permits discovery of any matter "relevant to the subject matter involved in the pending action" if it would either be admissible in evidence or "appears reasonably calculated to lead to the discovery of admissible evidence," the District Court ruled that because the defendant's state of mind was of "central importance" to the issue of malice in the case, it was obvious that the questions were relevant and "entirely appropriate to Herbert's efforts to discover whether Lando had any reason to doubt the veracity of certain of his sources, or, equally significant, to prefer the veracity of one source over another." 73 F. R. D. 387, 395, 396 (SDNY 1977). The District Court rejected the claim of constitutional privilege because it found nothing in the First Amendment or the relevant cases to permit or require it to increase the weight of the injured plaintiff's

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[2] The Court of Appeals summarized the inquiries to which Lando objected as follows:

"1. Lando's conclusions during his research and investigations regarding people or leads to be pursued, or not to be pursued, in connection with the '60 Minutes' segment and the Atlantic Monthly article;

"2. Lando's conclusions about facts imparted by interviewees and his state of mind with respect to the veracity of persons interviewed;

"3. The basis for conclusions where Lando testified that he did reach a conclusion concerning the veracity of persons, information or events;

"4. Conversations between Lando and Wallace about matter to be included or excluded from the broadcast publication; and

"5. Lando's intentions as manifested by his decision to include or exclude certain material." 568 F. 2d 974, 983 (CA2 1977).

already heavy burden of proof by in effect creating barriers "behind which malicious publication may go undetected and unpunished." *Id.*, at 394. The case was then certified for an interlocutory appeal under 28 U. S. C. § 1292 (b), and the Court of Appeals agreed to hear the case.[3]

A divided panel reversed the District Court. 568 F. 2d 974 (CA2 1977). Two judges, writing separate but overlapping opinions, concluded that the First Amendment lent sufficient protection to the editorial processes to protect Lando from inquiry about his thoughts, opinions, and conclusions with respect to the material gathered by him and about his conversations with his editorial colleagues. The privilege not to answer was held to be absolute. We granted certiorari because of the importance of the issue involved. 435 U. S. 922 (1978). We have concluded that the Court of Appeals misconstrued the First and Fourteenth Amendments and accordingly reverse its judgment.

II

Civil and criminal liability for defamation was well established in the common law when the First Amendment was adopted, and there is no indication that the Framers intended to abolish such liability. Until *New York Times*, the prevailing jurisprudence was that "[l]ibelous utterances [are not] within the area of constitutionally protected speech . . . ." *Beauharnais* v. *Illinois*, 343 U. S. 250, 266 (1952); see also *Roth* v. *United States*, 354 U. S. 476, 482–483 (1957); *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571–572 (1942); *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697, 707–708 (1931). The accepted view was that neither civil nor crimi-

[3] Respondents' petition for leave to appeal from an interlocutory order, which was granted, stated the issue on appeal as follows:

"What effect should be given to the First Amendment protection of the press with respect to its exercise of editorial judgment in pre-trial discovery in a libel case governed by *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964)?"

nal liability for defamatory publications abridges freedom of speech or freedom of the press, and a majority of jurisdictions made publishers liable civilly for their defamatory publications regardless of their intent.[4] *New York Times* and *Butts* effected major changes in the standards applicable to civil libel actions. Under these cases public officials and public figures who sue for defamation must prove knowing or reckless falsehood in order to establish liability. Later, in *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974), the Court held that nonpublic figures must demonstrate some fault on the defendant's part and, at least where knowing or reckless untruth is not shown, some proof of actual injury to the plaintiff before liability may be imposed and damages awarded.

These cases rested primarily on the conviction that the common law of libel gave insufficient protection to the First Amendment guarantees of freedom of speech and freedom of press and that to avoid self-censorship it was essential that liability for damages be conditioned on the specified showing of culpable conduct by those who publish damaging falsehood.

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[4] See, *e. g.*, Restatement of Torts § 580 (1938); Pedrick, Freedom of the Press and the Law of Libel: The Modern Revised Translation, 49 Corn. L. Q. 581, 583–584 (1964); Developments in the Law—Defamation, 69 Harv. L. Rev. 875, 902–910 (1956). In *Peck* v. *Tribune Co.*, 214 U. S. 185, 189 (1909), Mr. Justice Holmes summarized the prevailing view of strict liability in the course of reviewing a libel judgment rendered in a federal diversity of citizenship action:

"There was some suggestion that the defendant published the portrait by mistake, and without knowledge that it was the plaintiff's portrait or was not what it purported to be. But the fact, if it was one, was no excuse. If the publication was libellous the defendant took the risk. As was said of such matters by Lord Mansfield, 'Whatever a man publishes he publishes at his peril.' The *King* v. *Woodfall*, Lofft 776, 781. . . . The reason is plain. A libel is harmful on its face. If a man sees fit to publish manifestly hurtful statements concerning an individual, without other justification than exists for an advertisement or a piece of news, the usual principles of tort will make him liable, if the statements are false or are true only of some one else."

Given the required proof, however, damages liability for defamation abridges neither freedom of speech nor freedom of the press.

Nor did these cases suggest any First Amendment restriction on the sources from which the plaintiff could obtain the necessary evidence to prove the critical elements of his cause of action. On the contrary, *New York Times* and its progeny made it essential to proving liability that the plaintiff focus on the conduct and state of mind of the defendant. To be liable, the alleged defamer of public officials or of public figures must know or have reason to suspect that his publication is false. In other cases proof of some kind of fault, negligence perhaps,[5] is essential to recovery. Inevitably, unless liability is to be completely foreclosed, the thoughts and editorial processes of the alleged defamer would be open to examination.

It is also untenable to conclude from our cases that, although proof of the necessary state of mind could be in the form of objective circumstances from which the ultimate fact could be inferred, plaintiffs may not inquire directly from the defendants whether they knew or had reason to suspect that their damaging publication was in error. In *Butts*, for example, it is evident from the record that the editorial process had been subjected to close examination and that direct as well as indirect evidence was relied on to prove that the defendant magazine had acted with actual malice. The damages verdict was sustained without any suggestion that plaintiff's proof had trenched upon forbidden areas.[6]

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[5] The definition of fault was to be the responsibility of state laws. *Gertz v. Robert Welch, Inc.*, 418 U. S. 323, 347 (1974).

[6] See 388 U. S., at 156–159, where Mr. Justice Harlan, writing for a plurality of the Court, reviewed the record under the standard he preferred to apply to public figures, and upheld the verdict for the plaintiff. Mr. Chief Justice Warren independently reviewed the record under the "actual malice" standard of *New York Times* and also concluded in his concurring opinion

Reliance upon such state-of-mind evidence is by no means a recent development arising from *New York Times* and similar cases. Rather, it is deeply rooted in the common-law rule, predating the First Amendment, that a showing of malice on the part of the defendant permitted plaintiffs to

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that the verdict should be upheld. *Id.*, at 168–170. The evidence relied on and summarized in both opinions included substantial amounts of testimony that would fall within the editorial-process privilege as defined by respondents. The record before the Court included depositions by the author of the defamatory article, an individual paid to assist the author in preparation, the sports editor of the Saturday Evening Post, and both its managing editor and editor in chief. These depositions revealed the Saturday Evening Post's motives in publishing the story (Record, O. T. 1966, No. 37, pp. 706–717), sources (*id.*, at 364, 662–664, 719–720, 729), conversations among the editors and author concerning the research and development of the article (*id.*, at 363–367, 721–737), decisions and reasons relating to who should be interviewed and what should be investigated (*id.*, at 666–667, 699–700, 734–736, 772–774), conclusions as to the importance and veracity of sources and information presented in the article (*id.*, at 720, 732–735, 737, 771–772, 776), and conclusions about the impact that publishing the article would have on the subject (*id.*, at 714–716, 770). MR. JUSTICE BRENNAN, writing for himself and MR. JUSTICE WHITE, also thought the evidence of record sufficient to satisfy the *New York Times* malice standard. It is quite unlikely that the Court would have arrived at the result it did had it believed that inquiry into the editorial processes was constitutionally forbidden.

The Court engaged in similar analysis of the record in reversing the judgments entered in a companion case to *Butts, Associated Press* v. *Walker*, 388 U. S., at 158–159; *id.*, at 165 (Warren, C. J., concurring); and in *Time, Inc.* v. *Hill*, 385 U. S. 374, 391–394 (1967). In *Hill*, the record included the edited drafts of the allegedly libelous article and an examination and cross-examination of the author. During that examination, the writer explained in detail the preparation of the article, his thoughts, conclusions, and beliefs regarding the material, and a line-by-line analysis of the article with explanations of how and why additions and deletions were made to the various drafts. As in *Butts*, the editorial process was the focus of much of the evidence, and direct inquiry was made into the state of mind of the media defendants. Yet the Court raised no question as to the propriety of the proof.

recover punitive or enhanced damages.[7] In *Butts*, the Court affirmed the substantial award of punitive damages which in Georgia were conditioned upon a showing of "wanton or reckless indifference or culpable negligence" or "'ill will, spite, hatred and an intent to injure . . . .'" 388 U. S., at 165–166. Neither Mr. Justice Harlan, *id.*, at 156–162,[8] nor Mr. Chief Justice Warren, concurring, *id.*, at 165–168, raised any question as to the propriety of having the award turn on such a showing or as to the propriety of the underlying evidence,

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[7] A. Hanson, Libel and Related Torts ¶ 163 (1969); Developments in the Law—Defamation, *supra* n. 4, at 938; 50 Am. Jur. 2d, Libel and Slander § 352 (1970); 53 C. J. S., Libel and Slander § 260 (1955).

The Restatement originally provided in a separate section for the award of punitive damages for malicious defamations. Restatement of Torts § 1068 (Tent. Draft 13, 1936):

"One who is liable for harm to another's reputation caused by the publication of a libel or slander is also liable for punitive damages if the defamatory matter was published with knowledge of its falsity or if it was published in reckless indifference to its truth or falsity or solely for the purpose of causing harm to the plaintiff's reputation or other legally protected interest."

The provision was later omitted with the explanation that recovery of punitive damages would be determined by the rules in the Restatement with respect to damages in general. Restatement of Torts § 1068 (Proposed Final Draft 3, 1937).

Gertz v. *Robert Welch, Inc.*, *supra*, at 350, limited the entitlement to punitive damages, but such damages are still awardable upon a showing of knowing or reckless falsehood.

[8] As Mr. Justice Harlan noted, the jury had been instructed in considering punitive damages to assess "'the reliability, the nature of the sources of the defendant's information, *its acceptance or rejection of the sources*, and its care in checking upon assertions.'" 388 U. S., at 156 (emphasis added). The Justice found nothing amiss either with the instruction or the result the jury reached under it. MR. JUSTICE BRENNAN, dissenting in the *Butts* case, *id.*, at 172–174, analyzed the instructions differently but raised no question as to the constitutionality of turning the award of either compensatory or punitive damages upon direct as well as circumstantial evidence going to the mental state of the defendant.

which plainly included direct evidence going to the state of mind of the publisher and its responsible agents.[9]

Furthermore, long before *New York Times* was decided, certain qualified privileges had developed to protect a publisher from liability for libel unless the publication was made with malice.[10] Malice was defined in numerous ways, but in gen-

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[9] See n. 6, *supra*.

[10] See *Nalle* v. *Oyster*, 230 U. S. 165, 179–180 (1913); *White* v. *Nicholls*, 3 How. 266, 286–292 (1845); T. Plucknett, A Concise History of the Common Law 502 (5th ed. 1956); Hallen, Character of Belief Necessary for the Conditional Privilege in Defamation, 25 Ill. L. Rev. 865 (1931). In *White* v. *Nicholls*, *supra*, at 290–291, the Court surveyed the common law and summarized the privilege as follows:

"We have thus taken a view of the authorities which treat of the doctrines of slander and libel, and have considered those authorities particularly with reference to the distinction they establish between ordinary instances of slander, written and unwritten, and those which have been styled privileged communications; the peculiar character of which is said to exempt them from inferences which the law has created with respect to those cases that do not partake of that character. Our examination, extended as it may seem to have been, has been called for by the importance of a subject most intimately connected with the rights and happiness of individuals, as it is with the quiet and good order of society. The investigation has conducted us to the following conclusions, which we propound as the law applicable thereto. 1. That every publication, either by writing, printing, or pictures, which charges upon or imputes to any person that which renders him liable to punishment, or which is calculated to make him infamous, or odious, or ridiculous, is *prima facie* a libel, and implies malice in the author and publisher towards the person concerning whom such publication is made. Proof of malice, therefore, in the cases just described, can never be required of the party complaining beyond the proof of the publication itself: justification, excuse, or extenuation, if either can be shown, must proceed from the defendant. 2. That the description of cases recognised as privileged communications, must be understood as exceptions to this rule, and as being founded upon some apparently recognised obligation or motive, legal, moral, or social, which may fairly be presumed to have led to the publication, and therefore *prima facie* relieves it from that just implication from which the general rule of the law is deduced. The rule of evidence, as to such cases, is accordingly

eral depended upon a showing that the defendant acted with improper motive.[11] This showing in turn hinged upon the intent or purpose with which the publication was made, the belief of the defendant in the truth of his statement, or upon the ill will which the defendant might have borne toward the plaintiff.[12]

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so far changed as to impose it on the plaintiff to remove those presumptions flowing from the seeming obligations and situations of the parties, and to require of him to bring home to the defendant the existence of malice as the true motive of his conduct. Beyond this extent no presumption can be permitted to operate, much less be made to sanctify the indulgence of malice, however wicked, however express, under the protection of legal forms. We conclude then that malice may be proved, though alleged to have existed in the proceedings before a court, or legislative body, or any other tribunal or authority, although such court, legislative body, or other tribunal, may have been the appropriate authority for redressing the grievance represented to it; and that proof of express malice in any written publication, petition, or proceeding, addressed to such tribunal, will render that publication, petition, or proceeding, libellous in its character, and actionable, and will subject the author and publisher thereof to all the consequences of libel."

[11] Hallen, *supra*, at 866–867. In some jurisdictions a defendant forfeited his privilege if he published negligently or without probable cause to believe the statement was true. *Id.*, at 867; see *White* v. *Nicholls*, *supra*, at 291.

[12] See, *e. g.*, 50 Am. Jur. 2d, *supra* n. 7, § 455:

"The existence of actual malice may be shown in many ways. As a general rule, any competent evidence, either direct or circumstantial, can be resorted to, and all the relevant circumstances surrounding the transaction may be shown, provided they are not too remote, including threats, prior or subsequent defamations, subsequent statements of the defendant, circumstances indicating the existence of rivalry, ill will, or hostility between the parties, facts tending to show a reckless disregard of the plaintiff's rights, and, in an action against a newspaper, custom and usage with respect to the treatment of news items of the nature of the one under consideration. The plaintiff may show that the defendant had drawn a pistol at the time he uttered the words complained of; that defendant had tried to kiss and embrace plaintiff just prior to the defamatory publication; or that defendant had failed to make a proper investigation before publication of the statement in question. On cross-examination the

Courts have traditionally admitted any direct or indirect evidence relevant to the state of mind of the defendant and necessary to defeat a conditional privilege or enhance damages.[13] The rules are applicable to the press and to other defendants alike,[14] and it is evident that the courts across the country have long been accepting evidence going to the editorial processes of the media without encountering constitutional objections.[15]

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defendant may be questioned as to his intent in making the publication." (Footnotes and citations omitted.)

[13] *E. g.*, W. Odgers, A Digest of the Law of Libel and Slander *271–*288 (1st Am. ed. Bigelow 1881); 50 Am. Jur. 2d, *supra* n. 7, § 455; 53 C. J. S., *supra* n. 7, § 213.

[14] Cf. Odgers, *supra*, at *271; F. Holt, The Law of Libel 57 (1st Am. ed. 1818); *Billet* v. *Times-Democrat Publishing Co.*, 107 La. 751, 32 So. 17 (1902).

[15] In scores of libel cases, courts have addressed the general issue of the admissibility of evidence that would be excluded under the editorial-process privilege asserted here and have affirmed the relevance and admissibility of the evidence on behalf of libel plaintiffs. See, *e. g.*, *Johnson Publishing Co.* v. *Davis*, 271 Ala. 474, 124 So. 2d 441 (1960) (editor may be cross-examined on meaning intended to be conveyed by passages in magazine article); *Freeman* v. *Mills*, 97 Cal. App. 2d 161, 217 P. 2d 687 (1950) (malice may be established by direct proof of the state of mind of a person, or by evidence from which its existence may be inferred); *Scott* v. *Times-Mirror Co.*, 181 Cal. 345, 184 P. 672 (1919) (all relevant circumstances concerning publication admissible); *Sandora* v. *Times Co.*, 113 Conn. 574, 155 A. 819 (1931) (all relevant evidence including direct evidence on state of mind or surrounding circumstances—city editor and reporter called to stand and questioned extensively as to motives, circumstances of publication, and general practices); *Rice* v. *Simmons*, 2 Del. 309, 31 Am. Dec. 766 (1838) (where question of malice in issue, declarations of publisher at the time of publication admissible as part of the *res gestae*); *Western Union Telegraph Co.* v. *Vickers*, 71 Ga. App. 204, 30 S. E. 2d 440 (1944) (all relevant evidence admissible, including direct evidence of state of mind and surrounding circumstances); *Cook* v. *East Shore Newspapers*, 327 Ill. App. 559, 64 N. E. 2d 751 (1945) (all relevant evidence concerning circumstances of publications admissible, including testimony by reporters and employees of defendant); *Berger* v. *Freeman Tribune Publishing Co.*, 132 Iowa 290, 109 N. W. 784

In the face of this history, old and new, the Court of Appeals nevertheless declared that two of this Court's cases had announced unequivocal protection for the editorial proc-

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(1906) (all relevant evidence); *Thompson* v. *Globe Newspaper Co.*, 279 Mass. 176, 181 N. E. 249 (1932) (only evidence on state of mind of those agents of defendant entrusted with determining what shall be published is admissible and material); *Conroy* v. *Fall River Herald News Co.*, 306 Mass. 488, 28 N. E. 2d 729 (1940) (any relevant evidence on defendant's malice); *Cyrowski* v. *Polish-American Pub. Co.*, 196 Mich. 648, 163 N. W. 58 (1917) (testimony of individuals who advised reporter to question plaintiff before publishing defamatory article was admissible on the issue of malice); *Friedell* v. *Blakely Printing Co.*, 163 Minn. 226, 203 N. W. 974 (1925) (any relevant evidence admissible); *Cook* v. *Globe Printing Co.*, 227 Mo. 471, 127 S. W. 332 (1910) (evidence showing that defendant's editorial manager knew an important fact to be false admissible on question of malice); *Butler* v. *Gazette Co.*, 119 App. Div. 767, 104 N. Y. S. 637 (1907) (any evidence admissible to prove actual malice of defendant); *Briggs* v. *Byrd*, 34 N. C. 377 (1851) (express malice may be proved either by direct evidence or surrounding circumstances); *McBurney* v. *Times Publishing Co.*, 93 R. I. 331, 175 A. 2d 170 (1961) (relevant evidence admissible to rebut testimony by reporters and editors that they published without malice); *Lancour* v. *Herald & Globe Assn.*, 112 Vt. 471, 28 A. 2d 396 (1942) (any relevant evidence on malice); *Farrar* v. *Tribune Publishing Co.*, 57 Wash. 2d 549, 358 P. 2d 792 (1961) (all circumstances surrounding publication relevant and admissible).

Similarly, the courts have uniformly admitted such evidence on behalf of the defendant. See, *e. g.*, *Bohan* v. *Record Pub. Co.*, 1 Cal. App. 429, 82 P. 634 (1905) (testimony on good faith); *Hearne* v. *De Young*, 119 Cal. 670, 52 P. 150 (1898) (testimony on sources, precautions taken, and good faith); *Ballinger* v. *Democrat Co.*, 203 Iowa 1095, 212 N. W. 557 (1927) (testimony of reporter and editor on good faith admissible); *Snyder* v. *Tribune Co.*, 161 Iowa 671, 143 N. W. 519 (1913) (testimony as to source of information and good faith of reporter admissible); *Courier-Journal Co.* v. *Phillips*, 142 Ky. 372, 134 S. W. 446 (1911) (testimony of reporter on good faith); *Conner* v. *Standard Pub. Co.*, 183 Mass. 474, 67 N. E. 596 (1903) (testimony as to source of information); *Davis* v. *Marxhausen*, 103 Mich. 315, 61 N. W. 504 (1894) (testimony on good faith and proper precautions taken before publishing); *Julian* v. *Kansas City Star Co.*, 209 Mo. 35, 107 S. W. 496 (1908) (testimony on thoughts and intentions at the time of publication admissible); *Paxton* v. *Woodward*, 31 Mont. 195, 78 P.

ess. In each of these cases, *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974), and *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U. S. 94 (1973), we invalidated governmental efforts to pre-empt editorial decision by requiring the publication of specified material. In *Columbia Broadcasting System*, it was the requirement that a television network air paid political advertisements and in *Tornillo*, a newspaper's obligation to print a political candidate's reply to press criticism. Insofar as the laws at issue in *Tornillo* and *Columbia Broadcasting System* sought to control in advance the content of the publication, they were deemed as invalid as were prior efforts to enjoin

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215 (1904) (testimony as to motive, good faith, and sources); *Las Vegas Sun, Inc.* v. *Franklin*, 74 Nev. 282, 329 P. 2d 867 (1958) (testimony of publisher on good faith); *Lindsey* v. *Evening Journal Assn.*, 10 N. J. Misc. 1275, 163 A. 245 (1932) (testimony on good faith); *Kohn* v. *P&D Publishing Co.*, 169 App. Div. 580, 155 N. Y. S. 455 (1915) (source); *Hains* v. *New York Evening Journal*, 240 N. Y. S. 734 (Sup. Ct. 1930) (source); *Goodrow* v. *Malone Telegram, Inc.*, 235 App. Div. 3, 255 N. Y. S. 812 (1932) (reporter's testimony as to source); *Goodrow* v. *Press Co.*, 233 App. Div. 41, 251 N. Y. S. 364 (1931) (defendant can testify and introduce evidence on his good faith at time of publication); *Kehoe* v. *New York Tribune*, 229 App. Div. 220, 241 N. Y. S. 676 (1930) (testimony on good faith admissible to prevent imposition of punitive damages); *Varvaro* v. *American Agriculturist, Inc.*, 222 App. Div. 213, 225 N. Y. S. 564 (1927) (defendant may testify and introduce evidence on lack of malice); *Van Arsdale* v. *Time, Inc.*, 35 N. Y. S. 2d 951 (Sup. Ct.), aff'd, 265 App. Div. 919, 39 N. Y. S. 2d 413 (1942); *Weichbrodt* v. *New York Evening Journal*, 11 N. Y. S. 2d 112 (Sup. Ct. 1939) (defendant may testify as to good faith and probable cause); *Cleveland Leader Printing Co.* v. *Nethersole*, 84 Ohio St. 118, 95 N. E. 735 (1911) (testimony on good faith); *Cobb* v. *Oklahoma Pub. Co.*, 42 Okla. 314, 140 P. 1079 (1914) (defendant's testimony as to lack of malice and source of information); *Times Pub. Co.* v. *Ray*, 1 S. W. 2d 471 (Tex. Civ. App. 1927), aff'd, 12 S. W. 2d 165 (1929) (testimony as to lack of malice); *Pfister* v. *Milwaukee Free Press Co.*, 139 Wis. 627, 121 N. W. 938 (1909) (testimony as to absence of malice).

None of these cases as much as suggested that there were special limits applicable to the press on the discoverability of such evidence, either before or during trial.

publication of specified materials.[16] But holdings that neither a State nor the Federal Government may dictate what must or must not be printed neither expressly nor impliedly suggest that the editorial process is immune from any inquiry whatsoever.

It is incredible to believe that the Court in *Columbia Broadcasting System* or in *Tornillo* silently effected a substantial contraction of the rights preserved to defamation plaintiffs in *Sullivan, Butts,* and like cases. *Tornillo* and *Gertz* v. *Robert Welch, Inc.,* were announced on the same day; and although the Court's opinion in *Gertz* contained an overview of recent developments in the relationship between the First Amendment and the law of libel, there was no hint that a companion case had narrowed the evidence available to a defamation plaintiff. Quite the opposite inference is to be drawn from the *Gertz* opinion, since it, like prior First Amendment libel cases, recited without criticism the facts of record indicating that the state of mind of the editor had been placed at issue. Nor did the *Gertz* opinion, in requiring proof of some degree of fault on the part of the defendant editor and in forbidding punitive damages absent at least reckless disregard of truth or falsity, suggest that the First Amendment also foreclosed direct inquiry into these critical elements.[17]

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[16] As we stated in *Tornillo,* "no 'government agency—local, state, or federal—can tell a newspaper in advance what it can print and what it cannot.'" 418 U. S., at 255–256, quoting *Pittsburgh Press Co.* v. *Human Relations Comm'n,* 413 U. S. 376, 400 (1973) (STEWART, J., dissenting).

[17] Two years later, in *Time, Inc.* v. *Firestone,* 424 U. S. 448 (1976), there was likewise no indication that the plaintiff is subject to substantial evidentiary restrictions in proving the defendant's fault. As MR. JUSTICE POWELL and MR. JUSTICE STEWART stated in concurrence, the answer to this question of culpability "depends upon a careful consideration of all the relevant evidence concerning Time's actions prior to the publication of the 'Milestones' article." *Id.,* at 465–466. They suggested that on remand all the evidence of record should be considered, which included evidence going to the beliefs of Time's editorial staff. See *id.,* at 467–470, and n. 5.

In sum, contrary to the views of the Court of Appeals, according an absolute privilege to the editorial process of a media defendant in a libel case is not required, authorized, or presaged by our prior cases, and would substantially enhance the burden of proving actual malice, contrary to the expectations of *New York Times*, *Butts*, and similar cases.

III

It is nevertheless urged by respondents that the balance struck in *New York Times* should now be modified to provide further protections for the press when sued for circulating erroneous information damaging to individual reputation. It is not uncommon or improper, of course, to suggest the abandonment, modification, or refinement of existing constitutional interpretation, and notable developments in First Amendment jurisprudence have evolved from just such submissions. But in the 15 years since *New York Times*, the doctrine announced by that case, which represented a major development and which was widely perceived as essentially protective of press freedoms, has been repeatedly affirmed as the appropriate First Amendment standard applicable in libel actions brought by public officials and public figures. *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130 (1967); *St. Amant* v. *Thompson*, 390 U. S. 727 (1968); *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974); *Time, Inc.* v. *Firestone*, 424 U. S. 448 (1976). At the same time, however, the Court has reiterated its conviction—reflected in the laws of defamation of all of the States—that the individual's interest in his reputation is also a basic concern. *Id.*, at 455–457; *Gertz* v. *Robert Welch, Inc.*, *supra*, at 348–349.

We are thus being asked to modify firmly established constitutional doctrine by placing beyond the plaintiff's reach a range of direct evidence relevant to proving knowing or reckless falsehood by the publisher of an alleged libel, elements that are critical to plaintiffs such as Herbert. The case for

making this modification is by no means clear and convincing, and we decline to accept it.

In the first place, it is plain enough that the suggested privilege for the editorial process would constitute a substantial interference with the ability of a defamation plaintiff to establish the ingredients of malice as required by *New York Times*. As respondents would have it, the defendant's reckless disregard of the truth, a critical element, could not be shown by direct evidence through inquiry into the thoughts, opinions, and conclusions of the publisher, but could be proved only by objective evidence from which the ultimate fact could be inferred. It may be that plaintiffs will rarely be successful in proving awareness of falsehood from the mouth of the defendant himself, but the relevance of answers to such inquiries, which the District Court recognized and the Court of Appeals did not deny, can hardly be doubted. To erect an impenetrable barrier to the plaintiff's use of such evidence on his side of the case is a matter of some substance, particularly when defendants themselves are prone to assert their good-faith belief in the truth of their publications,[18] and libel plaintiffs are required to prove knowing or reckless falsehood with "convincing clarity." *New York Times Co.* v. *Sullivan*, 376 U. S., at 285–286.

Furthermore, the outer boundaries of the editorial privilege now urged are difficult to perceive. The opinions below did not state, and respondents do not explain, precisely when the editorial process begins and when it ends. Moreover, although we are told that respondent Lando was willing to testify as to what he "knew" and what he had "learned" from his interviews, as opposed to what he "believed," it is not at all clear why the suggested editorial privilege would not cover knowledge as well as belief about the veracity of published

[18] See, *e. g.*, the cases collected in n. 15, *supra*, in which media defendants asserted, and courts upheld, the right to present this type of evidence at trial in order to establish good faith and lack of malice.

reports.[19] It is worth noting here that the privilege as asserted by respondents would also immunize from inquiry the internal communications occurring during the editorial process and thus place beyond reach what the defendant participants learned or knew as the result of such collegiate conversations or exchanges. If damaging admissions to colleagues are to be barred from evidence, would a reporter's admissions made to third parties not participating in the editorial process also be immune from inquiry? We thus have little doubt that Herbert and other defamation plaintiffs have important interests at stake in opposing the creation of the asserted privilege.

Nevertheless, we are urged by respondents to override these important interests because requiring disclosure of editorial conversations and of a reporter's conclusions about the veracity of the material he has gathered will have an intolerable chilling effect on the editorial process and editorial decision-making. But if the claimed inhibition flows from the fear of damages liability for publishing knowing or reckless falsehoods, those effects are precisely what *New York Times* and other cases have held to be consistent with the First Amendment. Spreading false information in and of itself carries no First Amendment credentials. "[T]here is no constitutional value in false statements of fact." *Gertz* v. *Robert Welch, Inc., supra,* at 340.

Realistically, however, some error is inevitable; and the difficulties of separating fact from fiction convinced the Court in *New York Times, Butts, Gertz,* and similar cases to limit

[19] It was also suggested at oral argument that the privilege would cover questions in the "why" form, but not of the "who," "what," "when," and "where" type. Tr. of Oral Arg. 32–34. But it is evident from Lando's deposition that questions soliciting "why" answers relating to the editorial process were answered, *e. g.,* Tr. of Deposition 21, L. 7; 1892, L. 18, and that he refused to answer others that did not fall into this category, *e. g., id.,* at 666, L. 20; 774, L. 5; 877, L. 12; 880, L. 5; 1488, L. 3; 1893, L. 11; see Tr. of Oral Arg. 46.

liability to instances where some degree of culpability is present in order to eliminate the risk of undue self-censorship and the suppression of truthful material. Those who publish defamatory falsehoods with the requisite culpability, however, are subject to liability, the aim being not only to compensate for injury but also to deter publication of unprotected material threatening injury to individual reputation. Permitting plaintiffs such as Herbert to prove their cases by direct as well as indirect evidence is consistent with the balance struck by our prior decisions. If such proof results in liability for damages which in turn discourages the publication of erroneous information known to be false or probably false, this is no more than what our cases contemplate and does not abridge either freedom of speech or of the press.

Of course, if inquiry into editorial conclusions threatens the suppression not only of information known or strongly suspected to be unreliable but also of truthful information, the issue would be quite different. But as we have said, our cases necessarily contemplate examination of the editorial process to prove the necessary awareness of probable falsehood, and if indirect proof of this element does not stifle truthful publication and is consistent with the First Amendment, as respondents seem to concede, we do not understand how direct inquiry with respect to the ultimate issue would be substantially more suspect.[20] Perhaps such examination will lead to liability that would not have been found without it, but this does not suggest that the determinations in these instances will be inaccurate and will lead to the suppression of protected information. On the contrary, direct inquiry from the actors, which affords the opportunity to refute inferences that might otherwise be drawn from circumstantial evidence, suggests

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[20] The kind of question respondents seek to avoid answering is, by their own admission, the easiest to answer. See Tr. of Oral Arg. 31:

"[T]hey are set-up questions for our side. . . . [T]hese are not difficult questions to answer."

that more accurate results will be obtained by placing all, rather than part, of the evidence before the decisionmaker. Suppose, for example, that a reporter has two contradictory reports about the plaintiff, one of which is false and damaging, and only the false one is published. In resolving the issue whether the publication was known or suspected to be false, it is only common sense to believe that inquiry from the author, with an opportunity to explain, will contribute to accuracy. If the publication is false but there is an exonerating explanation, the defendant will surely testify to this effect.[21] Why should not the plaintiff be permitted to inquire before trial? On the other hand, if the publisher in fact had serious doubts about accuracy, but published nevertheless, no undue self-censorship will result from permitting the relevant inquiry. Only knowing or reckless error will be discouraged; and unless there is to be an absolute First Amendment privilege to inflict injury by knowing or reckless conduct, which respondents do not suggest, constitutional values will not be threatened.

It is also urged that frank discussion among reporters and editors will be dampened and sound editorial judgment endangered if such exchanges, oral or written, are subject to inquiry by defamation plaintiffs.[22] We do not doubt the direct relationship between consultation and discussion on the one hand and sound decisions on the other; but whether or not there is liability for the injury, the press has an obvious interest in avoiding the infliction of harm by the publication

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[21] Often it is the libel defendant who first presents at trial direct evidence about the editorial process in order to establish good faith and lack of malice. That was true in *New York Times Co.* v. *Sullivan*, see, *e. g.*, Record, O. T. 1963, No. 39, p. 762, and in many of the cases cited in n. 15, *supra*.

[22] They invoke our observation in *United States* v. *Nixon*, 418 U. S. 683, 705 (1974): "[T]hose who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process."

of false information, and it is not unreasonable to expect the media to invoke whatever procedures may be practicable and useful to that end. Moreover, given exposure to liability when there is knowing or reckless error, there is even more reason to resort to prepublication precautions, such as a frank interchange of fact and opinion. Accordingly, we find it difficult to believe that error-avoiding procedures will be terminated or stifled simply because there is liability for culpable error and because the editorial process will itself be examined in the tiny percentage of instances in which error is claimed and litigation ensues. Nor is there sound reason to believe that editorial exchanges and the editorial process are so subject to distortion and to such recurring misunderstanding that they should be immune from examination in order to avoid erroneous judgments in defamation suits. The evidentiary burden Herbert must carry to prove at least reckless disregard for the truth is substantial indeed, and we are unconvinced that his chances of winning an undeserved verdict are such that an inquiry into what Lando learned or said during the editorial process must be foreclosed.

This is not to say that the editorial discussions or exchanges have no constitutional protection from casual inquiry. There is no law that subjects the editorial process to private or official examination merely to satisfy curiosity or to serve some general end such as the public interest; and if there were, it would not survive constitutional scrutiny as the First Amendment is presently construed. No such problem exists here, however, where there is a specific claim of injury arising from a publication that is alleged to have been knowingly or recklessly false.[23]

[23] Mr. Justice Brennan would extend more constitutional protection to editorial discussion by excusing answers to relevant questions about in-house conversations until the plaintiff has made a prima facie case of falsity. If this suggestion contemplates a bifurcated trial, first on falsity and then on culpability and injury, we decline to subject libel trials to such burdensome complications and intolerable delay. On the other hand,

Evidentiary privileges in litigation are not favored,[24] and even those rooted in the Constitution must give way in proper circumstances. The President, for example, does not have an absolute privilege against disclosure of materials subpoenaed for a judicial proceeding. *United States* v. *Nixon*, 418 U. S. 683 (1974). In so holding, we found that although the President has a powerful interest in confidentiality of communications between himself and his advisers, that interest must yield to a demonstrated specific need for evidence. As we stated, in referring to existing limited privileges against disclosure, "[w]hatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." *Id.*, at 710.

With these considerations in mind, we conclude that the present construction of the First Amendment should not be modified by creating the evidentiary privilege which the respondents now urge.

IV

Although defamation litigation, including suits against the press, is an ancient phenomenon, it is true that our cases from *New York Times* to *Gertz* have considerably changed the profile of such cases. In years gone by, plaintiffs made out a prima facie case by proving the damaging publication. Truth

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if, as seems more likely, the prima facie showing does not contemplate a minitrial on falsity, no resolution of conflicting evidence on this issue, but only a credible assertion by the plaintiff, it smacks of a requirement that could be satisfied by an affidavit or a simple verification of the pleadings. We are reluctant to imbed this formalism in the Constitution.

[24] See *Elkins* v. *United States*, 364 U. S. 206, 234 (1960) (Frankfurter, J., dissenting): "Limitations are properly placed upon the operation of this general principle [of no testimonial privilege] only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." See also 8 J. Wigmore, Evidence § 2192 (McNaughton rev. 1961); 4 The Works of Jeremy Bentham 321 (J. Bowring ed. 1843).

and privilege were defenses. Intent, motive, and malice were not necessarily involved except to counter qualified privilege or to prove exemplary damages. The plaintiff's burden is now considerably expanded. In every or almost every case, the plaintiff must focus on the editorial process and prove a false publication attended by some degree of culpability on the part of the publisher. If plaintiffs in consequence now resort to more discovery, it would not be surprising; and it would follow that the costs and other burdens of this kind of litigation would escalate and become much more troublesome for both plaintiffs and defendants. It is suggested that the press needs constitutional protection from these burdens if it is to perform its task,[25] which is indispensable in a system such as ours.

Creating a constitutional privilege foreclosing direct inquiry into the editorial process, however, would not cure this problem for the press. Only complete immunity from liability for defamation would effect this result, and the Court has regularly found this to be an untenable construction of the First Amendment. Furthermore, mushrooming litigation costs, much of it due to pretrial discovery, are not peculiar to the libel and slander area. There have been repeated expressions of concern about undue and uncontrolled discovery, and voices from this Court have joined the chorus.[26] But

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[25] It is urged that the large costs of defending lawsuits will intimidate the press and lead to self-censorship, particularly where smaller newspapers and broadcasters are involved. It is noted that Lando's deposition alone continued intermittently for over a year and filled 26 volumes containing nearly 3,000 pages and 240 exhibits. As well as out-of-pocket expenses of the deposition, there were substantial legal fees, and Lando and his associates were diverted from news gathering and reporting for a significant amount of time.

[26] *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 740–741 (1975); *ACF Industries, Inc.* v. *EEOC*, 439 U. S. 1081 (1979) (POWELL, J., joined by STEWART and REHNQUIST, JJ., dissenting from denial of certiorari); Burger: Agenda for 2000 A. D.: A Need for Systematic Anticipation, Address at the Pound Conference, 70 F. R. D. 83, 95–96

until and unless there are major changes in the present Rules of Civil Procedure, reliance must be had on what in fact and in law are ample powers of the district judge to prevent abuse.

The Court has more than once declared that the deposition-discovery rules are to be accorded a broad and liberal treatment to effect their purpose of adequately informing the litigants in civil trials. *Schlagenhauf* v. *Holder*, 379 U. S. 104, 114–115 (1964); *Hickman* v. *Taylor*, 329 U. S. 495, 501, 507 (1947). But the discovery provisions, like all of the Federal Rules of Civil Procedure, are subject to the injunction of Rule 1 that they "be construed to secure the just, *speedy*, and *inexpensive* determination of every action." (Emphasis added.) To this end, the requirement of Rule 26 (b)(1) that the material sought in discovery be "relevant" should be firmly applied, and the district courts should not neglect their power to restrict discovery where "justice requires [protection for] a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . ." Rule 26 (c). With this authority at hand, judges should not hesitate to exercise appropriate control over the discovery process.

Whether, as a nonconstitutional matter, however, the trial judge properly applied the rules of discovery was not within the boundaries of the question certified under 28 U. S. C. § 1292 (b) and accordingly is not before us.[27] The judgment of the Court of Appeals is reversed.

So ordered.

MR. JUSTICE POWELL, concurring.

I join the opinion of the Court, and write separately to elaborate on what is said in Part IV. I do not see my obser-

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(1976). The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States has proposed amendments to the Federal Rules of Civil Procedure designed to ameliorate this problem. Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure (1978).

[27] MR. JUSTICE STEWART would remand to have the trial court rule once again on the relevance of the disputed questions. But the opinion of the

vations as being inconsistent with the Court's opinion; rather, I write to emphasize the additional point that, in supervising discovery in a libel suit by a public figure, a district court has a duty to consider First Amendment interests as well as the private interests of the plaintiff.

I agree with the Court that the explicit constitutional protection of First Amendment rights in a case of this kind, as articulated by *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), should not be expanded to create an evidentiary privilege. With respect to pretrial discovery in a civil proceeding, whatever protection the "exercise of editorial judgment" enjoys depends entirely on the protection the First Amendment accords the product of this judgment, namely, published speech.[1] As the Court makes clear, the privilege respondents claim is unnecessary to safeguard published speech. This holding requires a reversal of the judgment of the Court of Appeals. The Court notes, however, that whether "the trial judge properly applied the rules of discovery," as a nonconstitutional matter, is not before us under the question certified pursuant to 28 U. S. C. § 1292 (b), *ante*, at 177. I assume, therefore, that the litigation will continue and the District Court will review the interrogatories and questions which respondents declined to answer.

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trial judge reveals that he correctly understood that *New York Times* and *Gertz* required Herbert to prove either knowing falsehood or reckless disregard for truth. With the proper constitutional elements in mind, the judge went on to rule that the questions at issue were clearly relevant and that no constitutional privilege excused Lando from answering them. We hold that the judge committed no constitutional error but, contrary to MR. JUSTICE STEWART, find it inappropriate to review his rulings on relevancy.

[1] Our decisions in *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974), and *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U. S. 94 (1973), provide no support for the theory that the prepublication editorial process enjoys a special status under the First Amendment. Rather, those decisions rest on the fundamental principle that the coerced publication of particular views, as much as their suppression, violates the freedom of speech.

Earlier this Term, in dissenting from the denial of certiorari in *ACF Industries, Inc.* v. *EEOC*, 439 U. S. 1081 (1979), I had occasion to comment upon the widespread abuse of discovery that has become a prime cause of delay and expense in civil litigation. *Id.*, at 1086–1088. At the 1946 Term, just a few years after adoption of the Federal Rules of Civil Procedure, this Court stated "that the deposition-discovery rules are to be accorded a broad and liberal treatment." *Hickman* v. *Taylor*, 329 U. S. 495, 507 (1947). The bar and trial courts understandably responded affirmatively. As the years have passed, discovery techniques and tactics have become a highly developed litigation art—one not infrequently exploited to the disadvantage of justice. As the Court now recognizes, the situation has reached the point where there is serious "concern about undue and uncontrolled discovery." *Ante*, at 176.[2] In view of the evident attention given discovery by the District Judge in this case, it cannot be said that the process here was "uncontrolled." But it certainly was protracted and undoubtedly was expensive for all concerned.[3]

Under present Rules the initial inquiry in enforcement of any discovery request is one of relevance. Whatever standard may be appropriate in other types of cases, when a discovery demand arguably impinges on First Amendment rights a district court should measure the degree of relevance required in light of both the private needs of the parties and the public concerns implicated. On the one hand, as this Court has repeatedly recognized, the solicitude for First Amendment rights evidenced in our opinions reflects concern for the

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[2] See ABA, Report of Pound Conference Follow-Up Task Force, 74 F. R. D. 159, 191–192 (1976); Erickson, The Pound Conference Recommendations: A Blueprint for the Justice System in the Twenty-First Century, 76 F. R. D. 277, 288–290 (1978); Bell, The Pound Conference Follow-Up: A Response from the United States Department of Justice, 76 F. R. D. 320, 328 (1978); Powell, Reforms—Long Overdue, 33 Record of N. Y. C. B. A. 458, 461–463 (1978).

[3] See *ante*, at 176 n. 25.

important public interest in a free flow of news and commentary. See *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 781–783 (1978); *Saxbe* v. *Washington Post Co.*, 417 U. S. 843, 862–863 (1974) (POWELL, J., dissenting). On the other hand, there also is a significant public interest in according to civil litigants discovery of such matters as may be genuinely relevant to their lawsuit. Although the process of weighing these interests is hardly an exact science, it is a function customarily carried out by judges in this and other areas of the law. In performing this task, trial judges—despite the heavy burdens most of them carry—are now increasingly recognizing the "pressing need for judicial supervision." *AFC Industries, Inc.* v. *EEOC*, *supra*, at 1087.[4]

The Court today emphasizes that the focus must be on relevance, that the injunction of Fed. Rule Civ. Proc. 1 must be heeded, and that "district courts should not neglect their power to restrict discovery" in the interest of justice or to protect the parties from undue burden or expense. *Ante*, at 177; see Fed. Rule Civ. Proc. 26 (c). I join the Court's opinion on my understanding that in heeding these admonitions, the district court must ensure that the values protected by the First Amendment, though entitled to no constitutional privilege in a case of this kind, are weighed carefully in striking a proper balance.

MR. JUSTICE BRENNAN, dissenting in part.

Respondents are representatives of the news media. They are defendants in a libel action brought by petitioner, Lieu-

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[4] In some instances, it might be appropriate for the district court to delay enforcing a discovery demand, in the hope that the resolution of issues through summary judgment or other developments in discovery might reduce the need for the material demanded. It is pertinent to note that respondents here had not sought summary judgment on any issue at the time discovery was opposed, and have not argued that discovery should be postponed until other issues on which liability depends are resolved.

tenant Colonel Anthony Herbert (U. S. Army, Ret.), who is concededly a public figure. The Court today rejects respondents' claim that an "editorial privilege" shields from discovery information that would reveal respondents' editorial processes. I agree with the Court that no such privilege insulates factual matters that may be sought during discovery, and that such a privilege should not shield respondents' "mental processes." 568 F. 2d 974, 995 (CA2 1977) (Oakes, J.). I would hold, however, that the First Amendment requires predecisional communication among editors to be protected by an editorial privilege, but that this privilege must yield if a public-figure plaintiff is able to demonstrate to the prima facie satisfaction of a trial judge that the publication in question constitutes defamatory falsehood.

I

The Court of Appeals below stated that "the issue presented by this case is whether, and to what extent, inquiry into the editorial process, conducted during discovery in a *New York Times* v. *Sullivan* type libel action, impermissibly burdens the work of reporters and broadcasters." *Id.*, at 979 (Kaufman, C. J.). The court grouped the discovery inquiries objected to by respondents into five categories:

"1. Lando's conclusions during his research and investigations regarding people or leads to be pursued, or not to be pursued, in connection with the '60 Minutes' segment and the Atlantic Monthly article;

"2. Lando's conclusions about facts imparted by interviewees and his state of mind with respect to the veracity of persons interviewed;

"3. The basis for conclusions where Lando testified that he did reach a conclusion concerning the veracity of persons, information or events;

"4. Conversations between Lando and Wallace about matter to be included or excluded from the broadcast publication; and

"5. Lando's intentions as manifested by his decision to include or exclude certain material." *Id.*, at 983.

The Court of Appeals concluded:

"If we were to allow selective disclosure of how a journalist formulated his judgments on what to print or not to print, we would be condoning judicial review of the editor's thought processes. Such an inquiry, which on its face would be virtually boundless, endangers a constitutionally protected realm, and unquestionably puts a freeze on the free interchange of ideas within the newsroom." *Id.*, at 980.

The Court of Appeals held that all five categories of information sought by petitioner were shielded by an editorial privilege.

The holding of the Court of Appeals presents a novel and difficult question of law. Federal Rule Civ. Proc. 26 (b)(1) provides: "Parties may obtain discovery regarding any matter, *not privileged,* which is relevant to the subject matter involved in the pending action . . . ." (Emphasis supplied.) The instant case is brought under diversity jurisdiction, 28 U. S. C. § 1332 (a), and Fed. Rule Evid. 501 states that "in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness [or] person . . . shall be determined in accordance with State law." Although *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), placed constitutional limits on state libel claims, it did not itself create a federal cause of action for libel. The "rule of decision" in this case, therefore, is defined by state law. There is no contention, however, that applicable state law encompasses an editorial privilege. Thus if we were to create and apply such a privilege, it would have to be constitutionally grounded, as, for example, is executive privilege, see *United States* v. *Nixon*, 418 U. S. 683 (1974), or the privilege against self-incrimination. See *McCarthy* v. *Arndstein*, 266 U. S. 34 (1924). The exist-

ence of such a privilege has never before been urged before this Court.

This case must be approached from the premise that pretrial discovery is normally to be "accorded a broad and liberal treatment," *Hickman* v. *Taylor*, 329 U. S. 495, 507 (1947), and that judicial creation of evidentiary privileges is generally to be discouraged. We have in the past, however, recognized evidentiary privileges in order to protect "interests and relationships which . . . are regarded as of sufficient social importance to justify some incidental sacrifice of sources of facts needed in the administration of justice." E. Cleary, McCormick on Evidence 152 (2d ed. 1972). For example, *Hickman* v. *Taylor, supra*, created a qualified privilege for attorneys' work products in part because, without such a privilege, "[t]he effect on the legal profession would be demoralizing." 329 U. S., at 511. Similarly, *Roviaro* v. *United States*, 353 U. S. 53 (1957), recognized a qualified "informer's privilege" for "the furtherance and protection of the public interest in effective law enforcement." *Id.*, at 59.

The inquiry to be pursued, therefore, is whether the creation of an editorial privilege would so further the purposes and goals of the constitutional scheme as embodied in the First Amendment, as to justify "some incidental sacrifice" of evidentiary material. This inquiry need not reach an inflexible result: The justifications for an editorial privilege may well support only a qualified privilege which, in appropriate instances, must yield to the requirements of "the administration of justice."

II

Mr. Justice Brandeis reminded us over a half century ago that "[t]hose who won our independence . . . valued liberty both as an end and as a means." [1] *Whitney* v. *California*, 274

[1] Freedom of speech is itself an end because the human community is in large measure defined through speech; freedom of speech is therefore intrinsic to individual dignity. This is particularly so in a democracy

U. S. 357, 375 (1927) (concurring opinion). In its instrumental aspect, the First Amendment serves to foster the values of democratic self-government. This is true in several senses. The First Amendment bars the state from imposing upon its citizens an authoritative vision of truth.[2] It prohibits the state from interfering with the communicative processes

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like our own, in which the autonomy of each individual is accorded equal and incommensurate respect. As the Court stated in *Cohen* v. *California*, 403 U. S. 15, 24 (1971):

"The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests."

Respondents properly do not rest their arguments for an editorial privilege on the value of individual self-expression. So grounded, an editorial privilege might not stop short of shielding all speech.

[2] As Professor Zechariah Chafee, Jr., stated in 1946:

"The First Amendment protects . . . a social interest in the attainment of truth, so that the country may not only adopt the wisest course of action but carry it out in the wisest way. . . . Truth can be sifted out from falsehood only if the government is vigorously and constantly cross-examined . . . ." Free Speech in the United States 33.

Mr. Justice Holmes gave this social value a broader and more theoretical formulation:

"Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. . . . But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. . . . While that experiment is part of our system I think that we should be

through which its citizens exercise and prepare to exercise their rights of self-government.[3] And the Amendment shields those who would censure the state or expose its abuses.[4]

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eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country." *Abrams* v. *United States*, 250 U. S. 616, 630 (1919) (dissenting opinion). See *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 390 (1969).

[3] "Just so far as, at any point, the citizens who are to decide an issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good. *It is that mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed.* The principle of the freedom of speech springs from the necessities of the program of self-government. It is not a Law of Nature or of Reason in the abstract. It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage." A. Meiklejohn, Political Freedom: The Constitutional Powers of the People 27 (1965).

See *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U. S. 748, 765 (1976); Brennan, The Supreme Court and the Meiklejohn Interpretation of the First Amendment, 79 Harv. L. Rev. 1 (1965).

[4] See Blasi, The Checking Value in First Amendment Theory, 1977 Am. Bar Found. Research J. 521. Lord Erskine, while defending Thomas Paine in his trial for seditious libel, offered a compact and eloquent statement of this position:

"Gentlemen, I have insisted, at great length, upon the origin of governments, and detailed the authorities which you have heard upon the subject, because I consider it to be not only an essential support, but the very foundation of the liberty of the press. If Mr. Burke be right in his principles of government, I admit that the press, in my sense of its freedom, ought not to be free, nor free in any sense at all; and that all addresses to the people upon the subjects of government, and all speculations of amendment, of what kind or nature soever, are illegal and criminal; since if the people have, with out possible re-call, delegated all their authorities, they have no jurisdiction to act, and therefore none to think or write upon such subjects; and it would be a libel to arraign govern-

These various senses can sometimes weave together, as can be seen in the letter of 1774 addressed by the First Continental Congress to the inhabitants of Quebec, listing the rights "a profligate [English] Ministry are now striving, by force of arms, to ravish from us":

> "The last right we shall mention, regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs." [5]

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ment or any of its acts, before those who have no jurisdiction to correct them. But on the other hand . . . no legal argument can shake the freedom of the press in my sense of it, if I am supported in my doctrines concerning the great unalienable right of the people, to reform or to change their governments. It is because the liberty of the press resolves itself into this great issue, that it has been in every country the last liberty which subjects have been able to wrest from power. Other liberties are held under governments, but the liberty of opinion keeps governments themselves in due subjection to their duties." 1 Speeches of Lord Erskine 524–525 (J. High ed. 1876).

This position is often predicated upon a natural adversity between the government and the press. See A. Bickel, The Morality of Consent 80–88 (1975). In *Mills* v. *Alabama*, 384 U. S. 214, 219 (1966), for example, we stated:

"[T]he press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve. Suppression of the right of the press to praise or criticize governmental agents and to clamor and contend for or against change . . . muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free."

[5] 1 Journals of the Continental Congress 108 (1774) (W. Ford ed. 1904).

Although the various senses in which the First Amendment serves democratic values will in different contexts demand distinct emphasis and development, they share the common characteristic of being instrumental to the attainment of social ends. It is a great mistake to understand this aspect of the First Amendment solely through the filter of individual rights.[6] This is the meaning of our cases permitting a litigant to challenge the constitutionality of a statute as overbroad under the First Amendment if the statute "prohibits privileged exercises of First Amendment rights whether or not the record discloses that the petitioner has engaged in privileged conduct." *NAACP* v. *Button*, 371 U. S. 415, 432 (1963). Our reasoning is that First Amendment freedoms "are delicate and vulnerable, as well as supremely precious in our society," *id.*, at 433, and that a litigant should therefore be given standing to assert this more general social interest in the "vindication of freedom of expression." *Dombrowski* v. *Pfister*, 380 U. S. 479, 487 (1965). See *Thornhill* v. *Alabama*, 310 U. S. 88, 97–98 (1940). It is also the meaning of the "actual malice" standard set forth in *New York Times Co.* v. *Sullivan*, 376 U. S., at 279–280. Even though false information may have no intrinsic First Amendment worth, *St. Amant* v. *Thompson*, 390 U. S. 727, 732 (1968), and even though a particular defendant may have published false information, his freedom of expression is nevertheless protected in the absence of actual malice because, "to insure the ascertainment and publication

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[6] "[I]t is useless to define free speech by talk about rights. The agitator asserts his constitutional right to speak, the government asserts its constitutional right to wage war. The result is a deadlock.

. . . . . .

"The true boundary line of the First Amendment can be fixed only when Congress and the courts realize that the principle on which speech is classified as lawful or unlawful involves the balancing against each other of two very important social interests, in public safety and in the search for truth." Chafee, *supra* n. 2, at 31, 35.

of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones." *Ibid.*[7]

In recognition of the social values served by the First Amendment, our decisions have referred to "the *right of the public* to receive suitable access to social, political, esthetic, moral, and other ideas and experiences," *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 390 (1969) (emphasis supplied), and to "the circulation of information *to which the public is entitled* in virtue of the constitutional guaranties." *Grosjean* v. *American Press Co.*, 297 U. S. 233, 250 (1936) (emphasis supplied). In *Time, Inc.* v. *Hill*, 385 U. S. 374 (1967), we stated that the guarantees of the First Amendment "are not for the benefit of the press so much as for the benefit of all of us. A broadly defined freedom of the press assures the maintenance of our political system and an open society." *Id.*, at 389.

The editorial privilege claimed by respondents must be carefully analyzed to determine whether its creation would significantly further these social values recognized by our prior decisions. In this analysis it is relevant to note that respondents are representatives of the communications media, and that the "press and broadcast media," *Gertz* v. *Robert*

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[7] In an analogous manner the Court has, over my strong protest, analyzed the exclusionary rule as permitting a defendant to assert social interests that do not reduce to his personal rights:

"The primary justification for the exclusionary rule then is the deterrence of police conduct that violates Fourth Amendment rights. Post-*Mapp* decisions have established that the rule is not a personal constitutional right. It is not calculated to redress the injury to the privacy of the victim of the search or seizure, for any '[r]eparation comes too late.' *Linkletter* v. *Walker*, 381 U. S. 618, 637 (1965). Instead,

" 'the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect . . . .' *United States* v. *Calandra*, [414 U. S. 338, 348 (1974)]." *Stone* v. *Powell*, 428 U. S. 465, 486 (1976).

Welch, Inc., 418 U. S. 323, 343 (1974),[8] have played a dominant and essential role in serving the "informative function," *Branzburg* v. *Hayes*, 408 U. S. 665, 705 (1972), protected by the First Amendment. "The press cases emphasize the special and constitutionally recognized role of that institution in informing and educating the public, offering criticism, and providing a forum for discussion and debate." *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 781 (1978).[9] "The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern." *Grosjean* v. *American Press Co., supra*, at 250. An editorial privilege would thus not be merely personal to respondents, but would shield the press in its function "as an agent of the public at large. . . . The press is the necessary representative of the public's interest in this context and the instrumentality which effects the public's right." *Saxbe* v. *Washington Post Co.*, 417 U. S. 843, 863–864 (1974) (POWELL, J., dissenting).

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[8] Compare *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 282 (1964): "In *Barr* v. *Matteo*, 360 U. S. 564, 575, this Court held the utterance of a federal official to be absolutely privileged if made 'within the outer perimeter' of his duties. . . . Analogous considerations support the privilege for the *citizen-critic* of government. It is as much his duty to criticize as it is the official's duty to administer." (Emphasis supplied.)

[9] Of course, "the press does not have a monopoly on either the First Amendment or the ability to enlighten." *First National Bank of Boston* v. *Bellotti*, 435 U. S., at 782. "The informative function asserted by representatives of the organized press . . . is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists. Almost any author may quite accurately assert that he is contributing to the flow of information to the public . . . ." *Branzburg* v. *Hayes*, 408 U. S., at 705.

III

Miami Herald Publishing Co. v. *Tornillo*, 418 U. S. 241 (1974), struck down as undue interference with the editorial process a Florida statute granting a political candidate a right to equal space to reply to criticisms of his record by a newspaper.

> "Even if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forgo publication of news or opinion by the inclusion of a reply, the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time." *Id.*, at 258.

See *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U. S. 376, 391 (1973); *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U. S. 94, 120, 124–125 (1973). Through the editorial process expression is composed; to regulate the process is therefore to regulate the expression. The autonomy of the speaker is thereby compromised, whether that speaker is a large urban newspaper or an individual pamphleteer. The print and broadcast media, however, because of their large organizational structure, cannot exist without some form of editorial process. The protection

of the editorial process of these institutions thus becomes a matter of particular First Amendment concern.[10]

There is in this case, however, no direct government regulation of respondents' editorial process. But it is clear that disclosure of the editorial process of the press will increase the likelihood of large damages judgments in libel actions, and will thereby discourage participants in that editorial process.[11] And, as *New York Times* stated: "What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel. The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute." 376 U. S., at 277. Of course *New York Times* set forth a substantive standard defining that speech unprotected by the First Amendment, and respondents' editorial process cannot be shielded merely so as to block judicial determination of whether respondents have in fact engaged in such speech. As the Court states: "[I]f the claimed inhibition flows from the fear of damages liability for publishing knowing or reckless falsehoods, those effects are precisely what *New York Times* and

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[10] This is not, of course, to imply that the editorial process of persons or institutions other than the communications media does not merit First Amendment protection.

[11] The editorial process could be inhibited in other ways as well. For example, public figures might bring harassment suits against the media in order to use discovery to uncover aspects of the editorial process which, if publicly revealed, would prove embarrassing to the press. In different contexts other First Amendment values might be affected. If sued by a powerful political figure, for example, journalists might fear reprisals for information disclosed during discovery. Cf. *Reporters Committee for Freedom of the Press* v. *American Telephone & Telegraph Co.*, 192 U. S. App. D. C. 376, 593 F. 2d 1030 (1978). Such a chilling effect might particularly impact on the press' ability to perform its "checking" function. See n. 4, *supra*. In the instant case, however, petitioner is not such a public official, nor are respondents claiming to be suffering the effects of such a chill.

other cases have held to be consistent with the First Amendment." *Ante,* at 171. Our inquiry, therefore, becomes the independent First Amendment values served by the editorial process and the extent to which exposure of that process would impair these First Amendment values.

In *Tornillo* we defined the editorial process in a functional manner, as that process whereby the content and format of published material is selected. The Court of Appeals below identified two aspects of this process. The first concerns "the mental processes of the press regarding 'choice of material' . . . ." 568 F. 2d, at 995 (Oakes, J.). This aspect encompasses an editor's subjective "thought processes," his "thoughts, opinions and conclusions." *Id.,* at 980, 984 (Kaufman, C. J.). The Court of Appeals concluded that if discovery were permitted concerning this aspect of the editorial process, journalists "would be chilled in the very process of thought." *Id.,* at 984.

I find this conclusion implausible. Since a journalist cannot work without such internal thought processes, the only way this aspect of the editorial process can be chilled is by a journalist ceasing to work altogether. Given the exceedingly generous standards of *New York Times,* this seems unlikely. Moreover, *New York Times* removed First Amendment protection from defamatory falsehood published with actual malice—in knowing or reckless disregard of the truth.[12] Subsequent decisions have made clear that actual malice turns on a journalist's "subjective awareness of probable falsity." *Gertz* v. *Robert Welch, Inc.,* 418 U. S., at 335 n. 6. It would be anomalous to turn substantive liability on a journalist's subjective attitude and at the same time to shield from disclosure the most direct evidence of that attitude. There will be, of

[12] Elements of petitioner's complaint appear to set forth a claim for invasion of privacy. See *Time, Inc.* v. *Hill,* 385 U. S. 374 (1967). The case has come to this Court framed as a libel action, however, and I shall so consider it.

course, journalists at the margin—those who have some awareness of the probable falsity of their work but not enough to constitute actual malice—who might be discouraged from publication. But this chill emanates chiefly from the substantive standard of *New York Times*, not from the absence of an editorial privilege.

The second aspect of the editorial privilege identified by the Court of Appeals involves "the free interchange of ideas within the newsroom," 568 F. 2d, at 980 (Kaufman, C. J.), "the relationship among editors." *Id.*, at 993 (Oakes, J.). Judge Oakes concluded that "[i]deas expressed in conversations, memoranda, handwritten notes and the like, if discoverable, would in the future 'likely' lead to a more muted, less vigorous and creative give-and-take in the editorial room." *Id.*, at 993–994. Chief Judge Kaufman stated that "[a] reporter or editor, aware that his thoughts might have to be justified in a court of law, would often be discouraged and dissuaded from the creative verbal testing, probing, and discussion of hypotheses and alternatives which are the *sine qua non* of responsible journalism." *Id.*, at 980.

An editorial privilege protecting this aspect of the editorial process would essentially be analogous to the executive privilege which shields the "advisory opinions, recommendations and deliberations . . . by which governmental decisions and policies are formulated." *Carl Zeiss Stiftung* v. *V. E. B. Carl Zeiss, Jena*, 40 F. R. D. 318, 324 (DC 1966). As our cases interpreting Exemption 5 of the Freedom of Information Act, 5 U. S. C. § 552 (b)(5), make clear, this privilege would not protect merely "factual" material, but only "deliberative or policymaking processes." *EPA* v. *Mink*, 410 U. S. 73, 89 (1973). The rationale for this privilege was succinctly stated in *United States* v. *Nixon*, 418 U. S., at 705: "Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process."

The same rationale applies to respondents' proposed editorial privilege. Just as the possible political consequences of disclosure might undermine predecisional communication within the Executive Branch, see *NLRB* v. *Sears, Roebuck & Co.*, 421 U. S. 132, 151 (1975), so the possibility of future libel judgments might well dampen full and candid discussion among editors of proposed publications. Just as impaired communication "clearly" affects "the quality" of executive decisionmaking, *ibid.*, so too muted discussion during the editorial process will affect the quality of resulting publications. Those editors who have doubts might remain silent; those who would prefer to follow other investigative leads might be restrained; those who would otherwise counsel caution might hold their tongues. In short, in the absence of such an editorial privilege the accuracy, thoroughness, and profundity of consequent publications might well be diminished.

Such a diminution would affect First Amendment values. The Amendment embraces the public's interest in "accurate and effective reporting by the news media." *Saxbe* v. *Washington Post Co.*, 417 U. S., at 863 (POWELL, J., dissenting). "Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. . . . Abridgment of freedom of speech and of the press . . . impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government." [13] *Thornhill* v. *Alabama*, 310 U. S. 88, 95 (1940). Petitioner is concededly a public figure; "[o]ur citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of

[13] Were the plaintiff in this case a public official intent upon using discovery to intimidate the press, other First Amendment values might well be implicated. See n. 11, *supra*.

'public officials.'" *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130, 164 (1967) (Warren, C. J., concurring in result). To the extent coverage of such figures becomes fearful and inhibited, to the extent the accuracy, effectiveness, and thoroughness of such coverage is undermined, the social values protected by the First Amendment suffer abridgment.

I find compelling these justifications for the existence of an editorial privilege. The values at issue are sufficiently important to justify some incidental sacrifice of evidentiary material.[14] The Court today concedes the accuracy of the underlying rationale for such a privilege, stating that "[w]e do not doubt the direct relationship between consultation and discussion on the one hand and sound decisions on the other . . . ." *Ante*, at 173. The Court, however, contents itself with the curious observation that "given exposure to liability when there is knowing or reckless error, there is even more reason to resort to prepublication precautions, such as a frank interchange of fact and opinion." *Ante*, at 174. Be-

[14] My Brother POWELL writes separately to emphasize that district courts must carefully weigh "the values protected by the First Amendment" in determining the relevance of discovery requests. *Ante*, at 180. At the same time, however, he concludes that there should not be an evidentiary privilege which protects the editorial process because "whatever protection the 'exercise of editorial judgment' enjoys depends entirely on the protection the First Amendment accords the product of this judgment, namely, published speech," *ante*, at 178, and because an editorial privilege "is unnecessary to safeguard published speech." *Ibid.* I assume my Brother POWELL means by this that the exposure of predecisional editorial discussions will not meaningfully affect the nature of subsequent publications. But if this is true, I have difficulty understanding exactly what First Amendment values my Brother POWELL expects district courts to place in the balance. He may be suggesting that First Amendment values are impaired merely by requiring media defendants to respond to discovery requests like any other litigant. But even if district courts were to apply stricter standards of relevance in cases involving media defendants, the burden of pretrial discovery would be only marginally decreased, and it does not seem justified to assume that this result would meaningfully affect the nature of subsequent publications.

cause such "prepublication precautions" will often prove to be extraordinarily damaging evidence in libel actions, I cannot so blithely assume such "precautions" will be instituted, or that such "frank interchange" as now exists is not impaired by its potential exposure in such actions.

I fully concede that my reasoning is essentially paradoxical. For the sake of more accurate information, an editorial privilege would shield from disclosure the possible inaccuracies of the press; in the name of a more responsible press, the privilege would make more difficult of application the legal restraints by which the press is bound. The same paradox, however, inheres in the concept of an executive privilege: so as to enable the government more effectively to implement the will of the people, the people are kept in ignorance of the workings of their government. The paradox is unfortunately intrinsic to our social condition. Judgment is required to evaluate and balance these competing perspectives.

Judgment is also required to accommodate the tension between society's "pervasive and strong interest in preventing and redressing attacks upon reputation," *Rosenblatt* v. *Baer*, 383 U. S. 75, 86 (1966), and the First Amendment values that would be served by an editorial privilege. In my view this tension is too fine to be resolved in the abstract. As is the case with executive privilege, there must be a more specific balancing of the particular interests asserted in a given lawsuit. A general claim of executive privilege, for example, will not stand against a "demonstrated, specific need for evidence . . . ." *United States* v. *Nixon*, 418 U. S., at 713. Conversely, a general statement of need will not prevail over a concrete demonstration of the necessity for executive secrecy. *United States* v. *Reynolds*, 345 U. S. 1, 11 (1953). Other evidentiary privileges are similarly dependent upon the particular exigencies demonstrated in a specific lawsuit. *Roviaro* v. *United States*, 353 U. S. 53 (1957), for example, held that the existence of an informer's privilege depends

"on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." *Id.*, at 62. *Hickman* v. *Taylor*, 329 U. S. 495 (1947), similarly required ad hoc balancing to determine the existence of an attorneys' work-product privilege. The procedures whereby this balancing is achieved, so far from constituting mere "formalism," *ante*, at 175 n. 23, are in fact the means through which courts have traditionally resolved conflicts between competing social and individual interests.

In my judgment, the existence of a privilege protecting the editorial process must, in an analogous manner, be determined with reference to the circumstances of a particular case. In the area of libel, the balance struck by *New York Times* between the values of the First Amendment and society's interest in preventing and redressing attacks upon reputation must be preserved. This can best be accomplished if the privilege functions to shield the editorial process from general claims of damaged reputation. If, however, a public-figure plaintiff is able to establish, to the prima facie satisfaction of a trial judge, that the publication at issue constitutes defamatory falsehood,[15] the claim of damaged reputation becomes specific and demonstrable, and the editorial privilege must yield.[16] Contrary to the suggestion of the Court, an editorial privilege so understood would not create "a substantial interference with the ability of a defamation plaintiff to establish the ingredients of malice as required by *New York Times*." *Ante*, at 170. Requiring a public-figure plaintiff to make a

[15] See *Greenbelt Cooperative Publishing Assn.* v. *Bresler*, 398 U. S. 6 (1970).

[16] I do not reach the case in which a media defendant has more specific and concrete interests at stake. See nn. 11 and 13, *supra*. Nor do I reach the case in which a litigant with more weighty interests than a civil plaintiff attempts to overcome a claim of editorial privilege. See, *e. g.*, *Associated Press* v. *NLRB*, 301 U. S. 103 (1937); *Associated Press* v. *United States*, 326 U. S. 1 (1945).

prima facie showing of defamatory falsehood will not constitute an undue burden, since he must eventually demonstrate these elements as part of his case in chief.[17] And since editorial privilege protects only deliberative and policymaking processes and not factual material, discovery should be adequate to acquire the relevant evidence of falsehood. A public-figure plaintiff will thus be able to redress attacks on his reputation, and at the same time the editorial process will be protected in all but the most necessary cases.

IV

Applying these principles to the instant case is most difficult, since the five categories of objectionable discovery inquiries formulated by the Court of Appeals are general, and it is impossible to determine what specific questions are encompassed within each category. It would nevertheless appear that four of the five categories concern respondents' mental processes, and thus would not be covered by an editorial privilege. Only the fourth category—"Conversations between Lando and Wallace about matter to be included or excluded from the broadcast publication"—would seem to be protected by a proper editorial privilege. The Court of Appeals noted, however, that respondents had already made available to petitioner in discovery "the contents of pre-telecast conversations between Lando and Wallace . . . ." 568 F. 2d, at 982 (Kaufman, C. J.). Whether this constitutes waiver of the editorial privilege should be determined in the first instance by the District Court. I would therefore, like the Court of Appeals, remand this case to the District Court, but would require the District Court to determine (a) whether respondents have waived their editorial privilege; (b) if not, whether petitioner Herbert can overcome the privilege through

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[17] A plaintiff can make his prima facie showing as part of his motion for an order compelling discovery under Fed. Rule Civ. Proc. 37, or at any other appropriate time.

a prima facie showing of defamatory falsehood; and (c) if not, the proper scope and application of the privilege.

MR. JUSTICE STEWART, dissenting.

It seems to me that both the Court of Appeals and this Court have addressed a question that is not presented by the case before us. As I understand the constitutional rule of *New York Times Co.* v. *Sullivan*, 376 U. S. 254, inquiry into the broad "editorial process" is simply not relevant in a libel suit brought by a public figure against a publisher. And if such an inquiry is not relevant, it is not permissible. Fed. Rule Civ. Proc. 26 (b).

Although I joined the Court's opinion in *New York Times*, I have come greatly to regret the use in that opinion of the phrase "actual malice." For the fact of the matter is that "malice" as used in the *New York Times* opinion simply does not mean malice as that word is commonly understood. In common understanding, malice means ill will or hostility,[1] and the most relevant question in determining whether a person's action was motivated by actual malice is to ask "why." As part of the constitutional standard enunciated in the *New York Times* case, however, "actual malice" has nothing to do with hostility or ill will, and the question "why" is totally irrelevant.

Under the constitutional restrictions imposed by *New York Times* and its progeny, a plaintiff who is a public official or public figure can recover from a publisher for a defamatory statement upon convincingly clear proof of the following elements:

(1) the statement was published by the defendant,

(2) the statement defamed the plaintiff,

(3) the defamation was untrue, and

(4) the defendant knew the defamatory statement was untrue, or published it in reckless disregard of its truth or

[1] See Webster's New International Dictionary 1367 (2d ed. 1961).

falsity. *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29 (plurality opinion); *Ocala Star-Banner Co.* v. *Damron*, 401 U. S. 295; *Time, Inc.* v. *Pape*, 401 U. S. 279; *Monitor Patriot Co.* v. *Roy*, 401 U. S. 265; *Greenbelt Coop. Pub. Assn.* v. *Bresler*, 398 U. S. 6; *St. Amant* v. *Thompson*, 390 U. S. 727; *Beckley Newspapers Corp.* v. *Hanks*, 389 U. S. 81; *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130; *Rosenblatt* v. *Baer*, 383 U. S. 75; *New York Times Co.* v. *Sullivan*, *supra*. Cf. *Time, Inc.* v. *Firestone*, 424 U. S. 448; *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323; *Letter Carriers* v. *Austin*, 418 U. S. 264; *Time, Inc.* v. *Hill*, 385 U. S. 374; *Linn* v. *Plant Guard Workers*, 383 U. S. 53.

The gravamen of such a lawsuit thus concerns that which was in fact published. What was *not* published has nothing to do with the case. And liability ultimately depends upon the publisher's state of knowledge of the falsity of what he published, not at all upon his motivation in publishing it—not at all, in other words, upon actual malice as those words are ordinarily understood.

This is not the first time that judges and lawyers have been led astray by the phrase "actual malice" in the *New York Times* opinion. In *Greenbelt Coop. Pub. Assn.* v. *Bresler*, *supra*, another defamation suit brought by a public figure against a publisher, the trial judge instructed the jury that the plaintiff could recover if the defendant's publication had been made with malice, and that malice means "spite, hostility, or deliberate intention to harm." In reversing the judgment for the plaintiff, we said that this jury instruction constituted "error of constitutional magnitude." 398 U. S., at 10. Cf. *Letter Carriers* v. *Austin*, *supra*, at 281; *Rosenblatt* v. *Baer*, *supra*, at 83–84.

In the present case, of course, neither the Court of Appeals nor this Court has overtly committed the egregious error manifested in *Bresler*. Both courts have carefully enunciated the correct *New York Times* test. See 568 F. 2d 974, 985

(opinion of Oakes, J.), and *ante*, at 156–157. But each has then followed a false trail, explainable only by an unstated misapprehension of the meaning of *New York Times* "actual malice," to arrive at the issue of "editorial process" privilege. This misapprehension is reflected by numerous phrases in the prevailing Court of Appeals opinions: "a journalist's exercise of editorial control and judgment," "how a journalist formulated his judgments," "the editorial selection process of the press," "the heart of the editorial process," "reasons for the inclusion or exclusion of certain material." See 568 F. 2d 974, *passim*. Similar misapprehension is reflected in this Court's opinion by such phrases as "improper motive," "intent or purpose with which the publication was made," "ill will," and by lengthy footnote discussion about the spite or hostility required to constitute malice at common law. See *ante*, at 162 and 164.

Once our correct bearings are taken, however, and it is firmly recognized that a publisher's motivation in a case such as this is irrelevant, there is clearly no occasion for inquiry into the editorial process as conceptualized in this case. I shall not burden this opinion with a list of the 84 discovery questions at issue.[2] Suffice it to say that few if any of them

[2] The following are some random samples:

"Did you ever come to a conclusion that it was unnecessary to talk to Capt. Laurence Potter prior to the presentation of the program on February 4th?"

"Did you come to the conclusion that you did not want to have a filmed interview with Sgt. Carmon for the program?"

"When you prepared the final draft of the program to be aired, did you form any conclusion as to whether one of the matters presented by that program was Col. Herbert's view of the treatment of the Vietnamese?"

"Do you have any recollection of discussing with anybody at CBS whether that sequence should be excluded from the program as broadcast?"

"Prior to the publication of the Atlantic Monthly article, Mr. Lando, did you discuss that article or the preparation of that article with any representative of CBS?"

seem to me to come within even the most liberal construction of Fed. Rule Civ. Proc. 26 (b).[3]

By the time this case went to the Court of Appeals, the deposition of the respondent Lando alone had lasted intermittently for over a year and had filled 2,903 pages of transcript, with an additional 240 exhibits. The plaintiff had, in Chief Judge Kaufman's words, "already discovered what Lando knew, saw, said and wrote during his investigation." 568 F. 2d, at 984. That, it seems to me, was already more than sufficient.

In a system of federal procedure whose prime goal is "the just, speedy, and inexpensive determination of every action," [4] time-consuming and expensive pretrial discovery is burdensome enough, even when within the arguable bounds of Rule 26 (b). But totally irrelevant pretrial discovery is intolerable.

Like the Court of Appeals, I would remand this case to the District Court, but with directions to measure each of the proposed questions strictly against the constitutional criteria of *New York Times* and its progeny. Only then can it be determined whether invasion of the editorial process is truly threatened.

MR. JUSTICE MARSHALL, dissenting.

Although professing to maintain the accommodation of interests struck in *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), the Court today is unresponsive to the constitutional considerations underlying that opinion. Because I believe that some constraints on pretrial discovery are essential to ensure the "uninhibited [and] robust" debate on public

[3] Rule 26 (b) (1) provides in relevant part:

"Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

[4] Fed. Rule Civ. Proc. 1.

issues which *Sullivan* contemplated, *id.*, at 270, I respectfully dissent.

I

At issue in this case are competing interests of familiar dimension. States undeniably have an interest in affording individuals some measure of protection from unwarranted defamatory attacks. Libel actions serve that end, not only by assuring a forum in which reputations can be publicly vindicated and dignitary injuries compensated, but also by creating incentives for the press to exercise considered judgment before publishing material that compromises personal integrity. See *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 341–342 (1974); *Rosenblatt* v. *Baer*, 383 U. S. 75, 86 (1966).

Against these objectives must be balanced society's interest in promoting unfettered debate on matters of public importance. As this Court recognized in *Sullivan*, error is inevitable in such debate, and, if forced to guarantee the truth of all assertions, potential critics might suppress statements believed to be accurate "because of doubt whether [truthfulness] can be proved in court or fear of the expense of having to do so." 376 U. S., at 279. Such self-censorship would be incompatible with the tenets on which the First Amendment and our democratic institutions are founded. Under a representative system of government, an informed electorate is a precondition of responsive decisionmaking. See *Associated Press* v. *United States*, 326 U. S. 1, 20 (1945); *Grosjean* v. *American Press Co.*, 297 U. S. 233, 250 (1936); A. Meiklejohn, Free Speech and its Relation to Self-Government 88–89 (1948). To secure public exposure to the widest possible range of information and insights, some margin of error must be tolerated. Thus, absent knowing falsity or reckless disregard for the truth, the press is shielded from liability for defamatory statements regarding public figures. *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130 (1967); *New York Times Co.* v. *Sullivan*, *supra*.

Yet this standard of liability cannot of itself accomplish the ends for which it was conceived. Insulating the press from ultimate liability is unlikely to avert self-censorship so long as any plaintiff with a deep pocket and a facially sufficient complaint is afforded unconstrained discovery of the editorial process. If the substantive balance of interests struck in *Sullivan* is to remain viable, it must be reassessed in light of the procedural realities under which libel actions are conducted.

II

The potential for abuse of liberal discovery procedures is of particular concern in the defamation context. As members of the bench and bar have increasingly noted, rules designed to facilitate expeditious resolution of civil disputes have too often proved tools for harassment and delay.[1] Capitalizing on this Court's broad mandate in *Hickman* v. *Taylor*, 329 U. S. 495, 507 (1947), reaffirmed in *Schlagenhauf* v. *Holder*, 379 U. S. 104, 114–115 (1964), that discovery rules be accorded a "broad and liberal" scope, litigants have on occasion transformed Fed. Rule Civ. Proc. 26 devices into tactics of attrition. The possibility of such abuse is enhanced in libel litigation, for many self-perceived victims of defamation are animated by something more than a rational calculus of their chances of recovery.[2] Given the circumstances under which

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[1] See Bell, The Pound Conference Follow-up: A Response from the United States Department of Justice, 76 F. R. D. 320, 328–329 (1978); Erikson, The Pound Conference Recommendations: A Blueprint for the Justice System in the Twenty-First Century, 76 F. R. D. 277, 288–290 (1978); Lasker, The Court Crunch: A View from the Bench, 76 F. R. D. 245, 252 (1978); A. B. A. Litigation Section, Report of the Special Committee for the Study of Discovery Abuse (Oct. 1977); Stanley, President's Page, 62 A. B. A. J. 1375 (1976); Burger, Agenda for 2000 A. D.—A Need for Systematic Anticipation, 70 F. R. D. 83, 95–96 (1976); 4 J. Moore, Federal Practice ¶ 26.02 [3] (2d ed. 1976).

[2] See Anderson, Libel and Press Self-Censorship, 53 Texas L. Rev. 422, 435 (1975).

libel actions arise, plaintiffs' pretrial maneuvers may be fashioned more with an eye to deterrence or retaliation than to unearthing germane material.

Not only is the risk of *in terrorem* discovery particularly pronounced in the defamation context, but the societal consequences attending such abuse are of special magnitude. Rather than submit to the intrusiveness and expense of protracted discovery, even editors confident of their ability to prevail at trial or on a motion for summary judgment may find it prudent to " 'steer far wid[e] of the unlawful zone' thereby keeping protected discussion from public cognizance." *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29, 53 (1971) (plurality opinion; citation omitted). Faced with the prospect of escalating attorney's fees, diversion of time from journalistic endeavors, and exposure of potentially sensitive information, editors may well make publication judgments that reflect less the risk of liability than the expense of vindication.[3]

Although acknowledging a problem of discovery abuse, the Court suggests that the remedy lies elsewhere, in "major changes in the present Rules of Civil Procedure." *Ante*, at 177. And somewhat inconsistently, the Court asserts further that district judges already have "in fact and in law . . . ample powers . . . to prevent abuse." *Ibid.* I cannot agree. Where First Amendment rights are critically implicated, it is incumbent on this Court to safeguard their effective exercise. By leaving the directives of *Hickman* and *Schlagenhauf* unqualified with respect to libel litigation, the Court has abdicated that responsibility.[4]

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[3] As the facts of the instant case illustrate, that expense can be considerable. The deposition of Lando alone consumed 26 days and close to 3,000 pages of transcript. See 568 F. 2d 974, 982 (CA2 1977).

[4] Although the separate opinions of my Brothers POWELL and STEWART display greater solicitude for First Amendment values than does the opinion for the Court, I believe that they too elide the critical issue presented by this case. Under the "broad and liberal" standard of *Hickman*, surely

In my judgment, the same constitutional concerns that impelled us in *Sullivan* to confine the circumstances under which defamation liability could attach also mandate some constraints on roving discovery. I would hold that the broad discovery principles enunciated in *Hickman* and *Schlagenhauf* are inapposite in defamation cases. More specifically, I would require that district courts superintend pretrial disclosure in such litigation so as to protect the press from unnecessarily protracted or tangential inquiry. To that end, discovery requests should be measured against a strict standard of relevance. Further, because the threat of disclosure may intrude with special force on certain aspects of the editorial process, I believe some additional protection in the form of an evidentiary privilege is warranted.

III

The Court of Appeals extended a privilege subsuming essentially two kinds of discovery requests. The first included questions concerning the state of mind of an individual journalist, principally his conclusions and bases for conclusions as to the accuracy of information compiled during investigation. The second encompassed communications between journalists about matter to be included in the broadcast. 568 F. 2d 974, 978 (CA2 1977). Reasoning that discovery of both forms of material would be intrusive, that the intrusion would be inhibiting, and that such inhibition would be inconsistent with

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disclosure of what was known to a journalist but "was *not* published," *ante*, at 200 (opinion of STEWART, J.), will often be germane to whether that individual proceeded with deliberate or reckless disregard for the truth. And admonishing district courts to monitor discovery in the "interest of justice," *ante*, at 180 (opinion of POWELL, J.) or to prevent "undue burden or expense," *ibid.*, adds little to the guidance already afforded by Rule 26 and cannot adequately mitigate the burdens on the press so long as *Hickman*'s directive remains in force. Moreover, neither opinion is directly responsive to the effect of discovery on editorial discussion. See *infra*, at 208–209.

the editorial autonomy recognized in *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974), and *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U. S. 94 (1973), the Court of Appeals concluded that a privilege from disclosure was essential. 568 F. 2d, at 975.

With respect to state-of-mind inquiry, that syllogism cannot withstand analysis. For although discovery may well be intrusive, it is unclear how journalists faced with the possibility of such questions can be "chilled in the very process of thought." *Id.*, at 984. Regardless of whether strictures are placed on discovery, reporters and editors must continue to think, and to form opinions and conclusions about the veracity of their sources and the accuracy of their information. At best, it can be argued only that failure to insulate the press from this form of disclosure will inhibit not the editing process but the final product—that the specter of questions concerning opinion and belief will induce journalists to refrain from publishing material thought to be accurate. But as my Brother BRENNAN notes, *ante*, at 192–193, this inhibition would emanate principally from *Sullivan*'s substantive standard, not from the incremental effect of such discovery. So long as *Sullivan* makes state of mind dispositive, some inquiry as to the manner in which editorial decisions are made is inevitable. And it is simply implausible to suppose that asking a reporter why certain material was or was not included in a given publication will be more likely to stifle incisive journalism than compelling disclosure of other objective evidence regarding that decision.[5]

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[5] Respondents in this case produced a considerable amount of evidence regarding preparation of the broadcast:

"Lando answered innumerable questions about what he knew, or had seen; whom he interviewed; intimate details of his discussions with interviewees; and the form and frequency of his communications with sources. The exhibits produced included transcripts of his interviews; volumes of reporters notes; videotapes of interviews; and a series of drafts of the '60

I do not mean to suggest, as did the District Court here, that *Tornillo* and *Columbia Broadcasting* have "nothing to do" with this case. 73 F. R. D. 387, 396 (SDNY 1977). To the contrary, the values of editorial autonomy given recognition in those decisions should inform district courts as they monitor the discovery phase of defamation cases. But assuming that a trial judge has discharged his obligation to prevent unduly protracted or inessential disclosure, see *supra*, at 206, I am unpersuaded that the impact of state-of-mind inquiry will of itself threaten journalistic endeavor beyond the threshold contemplated by *Sullivan*.

External evidence of editorial decisionmaking, however, stands on a different footing. For here the concern is not simply that the ultimate product may be inhibited, but that the process itself will be chilled. Journalists cannot stop forming tentative hypotheses, but they can cease articulating them openly. If prepublication dialogue is freely discoverable, editors and reporters may well prove reluctant to air their

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Minutes' telecast. Herbert also discovered the contents of pre-telecast conversations between Lando and Wallace as well as reactions to documents considered by both." 568 F. 2d, at 982 (footnote omitted).

As an abstract proposition, it is not self-evident why disclosure of this material, for which no privilege was sought, would be less likely to inhibit the final publication than state-of-mind inquiries, which in most cases would presumably elicit self-serving responses. Indeed, as the Court acknowledges, plaintiffs may "rarely be successful in proving awareness of falsehood from the mouth of the defendant himself." *Ante*, at 170.

Thus, I seriously doubt that state-of-mind questions will substantially "increase the likelihood of large damages judgments in libel actions." *Ante*, at 191 (opinion of BRENNAN, J.). But neither can it be disputed that such questions might on occasion generate answers useful to plaintiffs in defamation suits. See, *e. g.*, *Davis* v. *Schuchat*, 166 U. S. App. D. C. 351, 355–356, 510 F. 2d 731, 735–736 (1975); *Goldwater* v. *Ginzburg*, 414 F. 2d 324, 334–335 (CA2 1969), cert. denied, 396 U. S. 1049 (1970); *Varnish* v. *Best Medium Publishing Co.*, 405 F. 2d 608, 612 (CA2 1968), cert. denied, 394 U. S. 987 (1969).

reservations or to explore other means of presenting information and comment. The threat of unchecked discovery may well stifle the collegial discussion essential to sound editorial dynamics. As we recognized in *United States* v. *Nixon*, 418 U. S. 683, 705 (1974): "[T]hose who expect public dissemination of their remarks may well temper candor with a concern for appearances . . . to the detriment of the decisionmaking process." (Footnote omitted.) Cf. *NLRB* v. *Sears, Roebuck & Co.*, 421 U. S. 132, 151 (1975). Society's interest in enhancing the accuracy of coverage of public events is ill-served by procedures tending to muffle expression of uncertainty. To preserve a climate of free interchange among journalists, the confidentiality of their conversation must be guaranteed.

It is not enough, I believe, to accord a discovery privilege that would yield before any plaintiff who can make a prima facie showing of falsity. See *ante*, at 197–198 (opinion of BRENNAN, J.). Unless a journalist knows with some certitude that his misgivings will enjoy protection, they may remain unexpressed. See 568 F. 2d, at 994 (Oakes, J., concurring). If full disclosure is available whenever a plaintiff can establish that the press erred in some particular, editorial communication would not be demonstrably less inhibited than under the Court's approach. And by hypothesis, it is precisely those instances in which the risk of error is significant that frank discussion is most valuable.

Accordingly, I would foreclose discovery in defamation cases as to the substance of editorial conversation.[6] Shielding

[6] Contrary to the Court's intimation, *ante*, at 165, 169–170, this would not be the first instance in which protection apart from the *Sullivan* malice standard has been extended to safeguard the constitutional interests implicated in libel suits. For example, lower courts have displayed sensitivity to First Amendment values in assessing motions to compel disclosure of confidential sources, see *Cervantes* v. *Time, Inc.*, 464 F. 2d 986, 992–994 (CA8 1972), cert. denied, 409 U. S. 1125 (1973), and motions by defendants for summary judgment. See *Washington Post Co.* v. *Keogh*, 125 U. S.

this limited category of evidence from disclosure would be unlikely to preclude recovery by plaintiffs with valid defamation claims. For there are a variety of other means to establish deliberate or reckless disregard for the truth, such as absence of verification, inherent implausibility, obvious reasons to doubt the veracity or accuracy of information, and concessions or inconsistent statements by the defendant. See *St. Amant* v. *Thompson*, 390 U. S. 727, 732 (1968). To the extent that such a limited privilege might deny recovery in some marginal cases, it is, in my view, an acceptable price to pay for preserving a climate conducive to considered editorial judgment.

I would therefore direct the Court of Appeals to remand this case to the District Court for determination first, whether the questions concerning Lando's state of mind satisfy the criteria set forth in Part II of this opinion, and second, whether respondents waived the privilege defined in Part III for prepublication discussions.

App. D. C. 32, 34–35, 365 F. 2d 965, 967–968 (1966), cert. denied, 385 U. S. 1011 (1967).

Different considerations would, of course, obtain if a privilege for editorial communications were sought in conjunction with criminal proceedings. Cf. *New York Times Co.* v. *Jascalevich*, 439 U. S. 1331 (1978) (MARSHALL, J., in chambers); *United States* v. *Nixon*, 418 U. S. 683, 712–713 (1974); *Branzburg* v. *Hayes*, 408 U. S. 665 (1972); *id.*, at 741–743 (STEWART, J., dissenting).

Syllabus

DOUGLAS OIL COMPANY OF CALIFORNIA ET AL. *v.* PETROL STOPS NORTHWEST ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 77-1547. Argued December 5, 1978—Decided April 18, 1979

Respondents are independent gasoline dealers, one of which operates in Arizona and several other States, and two of which operate in the vicinity of Tucson, Ariz. They brought civil antitrust actions in the District Court in Arizona against several large oil companies, including petitioners. While these proceedings were in pretrial stages, a Government antitrust investigation in the Central District of California culminated in an indictment for illegal price fixing in California, Arizona, and elsewhere, of petitioners and several other large oil companies, all of which ultimately pleaded *nolo contendere*. After unavailing discovery requests, respondents petitioned the District Court for the Central District of California to order release of certain grand jury transcripts under Fed. Rule Crim. Proc. 6 (e) (2) (C) (i), which provides for disclosure of grand jury transcripts "when so directed by a court preliminarily to or in connection with a judicial proceeding." The Antitrust Division did not object to the disclosure. Over petitioners' objection, the transcripts' release was ordered by the District Court for the Central District of California, subject to various protective conditions. The Court of Appeals affirmed, relying upon *United States* v. *Procter & Gamble Co.*, 356 U. S. 677, which held that parties seeking grand jury transcripts must show that the material sought is needed to avoid a possible injustice in another judicial proceeding; that the disclosure need exceeds the need for continued secrecy; and that the disclosure request covers only the material needed. The court found that continued grand jury secrecy was not a substantial factor as the grand jury proceeding had concluded three years before and the transcripts had already been released to petitioners. Although the court conceded that it knew little about the Arizona proceedings, it speculated that the transcripts would facilitate prosecution of the civil suits.

Held:

1. The courts below did not err in selecting the standard governing disclosure of grand jury transcripts under Rule 6 (e). Though the veil of grand jury secrecy should not be lifted unnecessarily, it is recognized

that in some situations justice may demand that discrete portions of transcripts be made available in subsequent proceedings. Here the California District Court made clear that it had to be demonstrated that a particularized need for disclosure outweighed the interest in continued grand jury secrecy, and the Court of Appeals correctly understood the standard applied in *Procter & Gamble, supra.* Pp. 217–224.

2. In this case, however, the California District Court having custody of the grand jury transcripts abused its discretion in issuing the disclosure order, for that court concededly had no dependable knowledge of the status of, and the needs of the parties in, the Arizona civil suits. The court based its decision largely upon unsupported assertions of counsel during oral argument, supplemented by other inadequate data such as the criminal indictment and the civil complaints. Even a comparison of those documents did not clearly show what portions, if any, of the transcripts would be pertinent to the Arizona actions, which involved only some of the same parties and only some of the same territory as were involved in the criminal case. Under these circumstances, the better practice would have been for the California District Court, after making a written evaluation of the need for continued grand jury secrecy and a determination that the limited evidence before it showed that disclosure might be appropriate, to send the requested materials to the Arizona District Court where the civil cases were pending. Pp. 224–231.

571 F. 2d 1127, reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, BLACKMUN, and REHNQUIST, JJ., joined. REHNQUIST, J., filed a concurring opinion, *post,* p. 231. STEVENS, J., filed a dissenting opinion, in which BURGER, C. J., and STEWART, J., joined, *post,* p. 233.

Max L. Gillam argued the cause for petitioners. With him on the briefs were *Morris A. Thurston* and *Thomas H. Burton, Jr.*

Daniel L. Berman argued the cause and filed a brief for the nongovernment respondents.

Sara S. Beale argued the cause for the United States. With her on the brief were *Solicitor General McCree, Assistant Attorney General Shenefield, Louis F. Claiborne,* and *Robert B. Nicholson.*

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents two intertwined questions concerning a civil litigant's right to obtain transcripts [1] of federal criminal grand jury proceedings. First, what justification for disclosure must a private party show in order to overcome the presumption of grand jury secrecy applicable to such transcripts? Second, what court should assess the strength of this showing—the court where the civil action is pending, or the court that acts as custodian of the grand jury documents?

I

Respondent Petrol Stops Northwest is a gasoline retailer unaffiliated with any major oil company. In 1973, it operated 104 service stations located in Arizona, California, Oregon, Washington, and several other States. On December 13, 1973, respondent filed an antitrust action in the District of Arizona against 12 large oil companies, including petitioners Douglas Oil Co. of California and Phillips Petroleum Co.[2] In its complaint, respondent alleged that on January 1, 1973, there had been a sharp reduction in the amount of gasoline offered for sale to it, and that this reduction had resulted from a conspiracy among the oil companies to restrain trade in gasoline, in violation of §§ 1 and 2 of the Sherman Act. 26 Stat. 209, as amended, 15 U. S. C. §§ 1, 2. As a part of this conspiracy, respondent charged, petitioners and their codefendants had fixed the prices of gasoline at the retail and wholesale distribution levels in California, Oregon, and Washington.[3]

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[1] "Transcripts" is used herein to refer to the verbatim recordings of testimony given before a grand jury.

[2] Also named as defendants were Continental Oil Co. (an affiliate of petitioner Douglas Oil); Gulf Oil Co.; Shell Oil Co.; Exxon Corp.; Mobil Oil Corp.; Union Oil Co. of California; Amoco Oil Co.; Standard Oil Co. of California; Standard Oil Co. of Indiana; and Armour Oil Co.

[3] In addition, the complaint charged that the defendants had tied the sale of gasoline to the leasing of service stations, had entered into a

Respondents Gas-A-Tron of Arizona and Coinoco also independently sell gasoline through service stations they own or lease. Unlike respondent Petrol Stops Northwest, however, their operations are limited to the vicinity of Tucson, Ariz. On November 2, 1973, Gas-A-Tron and Coinoco filed an antitrust complaint in the District of Arizona naming as defendants nine large oil companies, including petitioner Phillips Petroleum Co.[4] Like respondent Petrol Stops Northwest, Gas-A-Tron and Coinoco alleged that as of January 1, 1973, their supply of gasoline had been sharply reduced, and attributed this reduction to a conspiracy to restrain trade in violation of the Sherman Act. The specific charges of illegal behavior asserted by the two retailers substantially paralleled those made by Petrol Stops Northwest in its complaint, and included an allegation that the defendants had fixed the price of gasoline at the wholesale and retail levels.[5]

Although the issues and defendants in the two actions were substantially the same, the cases were assigned to two different judges in the District of Arizona. In February 1974, respondents served upon petitioners a set of interrogatories which included a request that petitioners state whether either of their companies at any time between January 1, 1968, and December 14, 1974 (*sic*), had had any communication with any of their competitors concerning the wholesale price of gasoline to be sold to unaffiliated retailers. Petitioners also were asked to produce any documents they had concerning

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concerted refusal to deal with independent gasoline retailers, had maintained a monopoly over the refinery capacity of the United States, and had set predatory prices.

[4] Also named as defendants were Union Oil Co. of California; Amoco Oil Co.; Standard Oil Co. of Indiana; Shell Oil Co.; Mobil Oil Corp.; Standard Oil Co. of California; Exxon Corp.; and Diamond Shamrock.

[5] In addition, Gas-A-Tron and Coinoco charged that the oil companies had violated the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. §§ 13–13b and 21a, by selling gasoline to affiliated retailers at prices more favorable than those offered unaffiliated retailers such as respondents.

such communications. Petitioners responded that they were aware of no such communications, and therefore could produce no documents pertinent to the request.[6]

In the meantime, the Antitrust Division of the Department of Justice had been investigating since 1972 the pricing behavior on the west coast of several major oil companies, including petitioners. See App. 26. As part of this investigation, employees of petitioners were called to testify before a grand jury empaneled in the Central District of California. The Government's investigation culminated on March 19, 1975, when the grand jury returned an indictment charging petitioners and four other oil companies with having conspired to fix the price of "rebrand gasoline" in California, Oregon, Washington, Nevada, and Arizona.[7] The indictment alleged that the price-fixing conspiracy had begun in July 1970 and had continued at least until the end of 1971.

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[6] In its response to the interrogatory, petitioner Phillips stated:

"Since October, 1969, it has been Phillips' policy to refrain from any conversations or communications with any and all of its competitors relating in any way to prices except in situations where Phillips is selling to or buying from a competitor and the price of the product being bought and sold obviously must be discussed." 2 Record 6.

[7] In addition to petitioners, Powerene Oil Co., Fletcher Oil & Refining Co., Golden Eagle Refining Co., and MacMillan Ring-Free Oil Co. were named as codefendants. The indictment alleged, in part, that the defendants and co-conspirators had engaged in an unlawful combination and conspiracy in restraint of trade, "in violation of Section 1 of the Act of Congress of July 2, 1890, as amended (15 U. S. C. § 1), commonly known as the Sherman Act. . . . The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding and concert of action among the defendants and co-conspirators, the substantial terms of which have been to increase, fix, stabilize and maintain the price of rebrand gasoline." App. 126–127.

"Rebrand gasoline" is defined in the indictment to mean "gasoline sold for resale in service stations under a trademark or brand name not owned or controlled by an oil refiner." *Id.*, at 124. It appears to be undisputed that the gasoline purchased by respondents from the major oil companies was "rebrand gasoline" within the meaning of the indictment.

Although initially all six defendants charged in the criminal indictment pleaded not guilty, by December 1975, each had pleaded *nolo contendere* and was fined $50,000. Before changing their pleas, petitioners, acting pursuant to Fed. Rule Crim. Proc. 16 (a)(1)(A), asked the District Court for the Central District of California to give them copies of the transcripts of testimony given by their employees before the grand jury. Their request was granted, and it appears that petitioners continue to possess copies of these transcripts.

In October 1976, respondents served upon petitioners requests under Fed. Rule Civ. Proc. 34 for production of the grand jury transcripts in petitioners' possession. Petitioners objected to the requests for production, arguing that the transcripts were not relevant to the private antitrust actions and that they were not likely to lead to any admissible evidence. Respondents did not pursue their discovery requests by making a motion in the Arizona trial court under Fed. Rule Civ. Proc. 37 to compel discovery. See n. 17, *infra*. Rather, they filed a petition in the District Court for the Central District of California asking that court, as guardian of the grand jury transcripts under Fed. Rule Crim. Proc. 6 (e), to order them released to respondents. An attorney from the Antitrust Division of the Department of Justice appeared and indicated that the Government had no objection to respondents' receiving the transcripts already made available to petitioners under Fed. Rule Crim. Proc. 16 (a)(1)(A). He suggested to the court, however, that the real parties in interest were petitioners, and therefore that they should be given an opportunity to be heard. The California District Court accepted this suggestion, and petitioners participated in the proceedings as parties adverse to respondents.

After briefing and oral argument, the court ordered the Chief of the Antitrust Division's Los Angeles Office "to produce for [respondents'] inspection and copying all grand jury transcripts previously disclosed to Phillips Petroleum Company or Douglas Oil Company of California or their attorneys

relating to the indictment in *United States* v. *Phillips, et al.*, Criminal Docket No. 75–377." App. 48–49. The production order was subject, however, to several protective conditions. The transcripts were to "be disclosed only to counsel for [respondents] in connection with the two civil actions" pending in Arizona. Furthermore, under the court's order the transcripts of grand jury testimony "may be used . . . solely for the purpose of impeaching that witness or refreshing the recollection of a witness, either in deposition or at trial" in the Arizona actions. Finally, the court forbade any further reproduction of the matter turned over to respondents, and ordered that the material be returned to the Antitrust Division "upon completion of the purposes authorized by this Order."

On appeal, the Ninth Circuit affirmed the disclosure order. *Petrol Stops Northwest* v. *United States*, 571 F. 2d 1127 (1978). The Court of Appeals noted that under *United States* v. *Procter & Gamble Co.*, 356 U. S. 677 (1958), a party seeking access to grand jury transcripts must show a "particularized need." In evaluating the strength of the need shown in the present case, the Ninth Circuit considered two factors: the need for continued grand jury secrecy and respondents' need for the requested material. The court found the former need to be insubstantial, as the grand jury proceeding had concluded three years before and the transcripts already had been released to petitioners. As to respondents' claim, the court conceded that it knew little about the Arizona proceedings, but speculated that the transcripts would facilitate the prosecution of respondents' civil suits: Petitioners' answers to the 1974 interrogatories concerning price communications with competitors appeared to be at odds with their pleas of *nolo contendere* in the California criminal action.

II

Petitioners contend that the courts below erred in holding that, because the grand jury had dissolved and the requested material had been disclosed already to the defendants, re-

spondents had to show only a "slight need" for disclosure.[8] According to petitioners, this approach to disclosure under Fed. Rule Crim. Proc. 6 (e) is contrary to prior decisions of this Court indicating that "a civil litigant must demonstrate a compelling necessity for specified grand jury materials before disclosure is proper." Brief for Petitioners 16.

We consistently have recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings. See, *e. g., United States* v. *Procter & Gamble Co., supra.*[9] In particular, we have noted several

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[8] As an initial matter, respondents argue that petitioners lack standing to object to the disclosure order, as the only interest in grand jury secrecy remaining in this case is a public one. Accord, *United States* v. *American Oil Co.*, 456 F. 2d 1043 (CA3 1972) (*per curiam*). Contra, *Illinois* v. *Sarbaugh*, 552 F. 2d 768 (CA7), cert. denied *sub nom. J. L. Simmons Co.* v. *Illinois*, 434 U. S. 889 (1977). There can be no question that there is standing under Art. III for petitioners to object to the disclosure order, as release of the transcripts to their civil adversaries could result in a substantial injury to them. See *Warth* v. *Seldin*, 422 U. S. 490, 499 (1975). Moreover, the interest petitioners assert is one legally protected under the Court's rulings concerning grand jury secrecy. One of the several interests promoted by grand jury secrecy is the protection of the innocent accused from disclosure of the accusations made against him before the grand jury. See n. 10, *infra*. Although petitioners in the present case were indicted and pleaded *nolo contendere*, under our decisions they nonetheless are legally entitled to protection, as there may have been accusations made for which no indictment was returned.

[9] Since the 17th century, grand jury proceedings have been closed to the public, and records of such proceedings have been kept from the public eye. See Calkins, Grand Jury Secrecy, 63 Mich. L. Rev. 455, 457 (1965). The rule of grand jury secrecy was imported into our federal common law and is an integral part of our criminal justice system. See *Costello* v. *United States*, 350 U. S. 359, 362 (1956); *United States* v. *Johnson*, 319 U. S. 503, 513 (1943). Federal Rule Crim. Proc. 6 (e) codifies the requirement that grand jury activities generally be kept secret, by providing:

"A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, [or] an attorney for the Government . . . shall not disclose matters occurring before the grand

distinct interests served by safeguarding the confidentiality of grand jury proceedings. First, if preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements. There also would be the risk that those about to be indicted would flee, or would try to influence individual grand jurors to vote against indictment. Finally, by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule.[10]

For all of these reasons, courts have been reluctant to lift unnecessarily the veil of secrecy from the grand jury. At the same time, it has been recognized that in some situations justice may demand that discrete portions of transcripts be

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jury, except as otherwise provided for in these rules. . . . A knowing violation of rule 6 may be punished as a contempt of court."

Although the purpose for grand jury secrecy originally was protection of the criminally accused against an overreaching Crown, see Calkins, Grand Jury Secrecy, *supra*, with time it came to be viewed as necessary for the proper functioning of the grand jury. See n. 10, *infra*.

[10] In *United States* v. *Procter & Gamble Co.*, 356 U. S. 677, 681–682, n. 6 (1958), we said that the reasons for grand jury secrecy had been summarized correctly in *United States* v. *Rose*, 215 F. 2d 617, 628–629 (CA3 1954):

"(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witness who may testify before [the] grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.'"

made available for use in subsequent proceedings. See, *e. g.*, *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 233–234 (1940). Indeed, recognition of the occasional need for litigants to have access to grand jury transcripts led to the provision in Fed. Rule Crim. Proc. 6 (e)(2)(C)(i) that disclosure of grand jury transcripts may be made "when so directed by a court preliminarily to or in connection with a judicial proceeding." [11]

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[11] Federal Rule Crim. Proc. 6 (e) provides in full:

"(e) Secrecy of Proceedings and Disclosure.—

"(1) General rule.—A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the Government, or any person to whom disclosure is made under paragraph (2)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of rule 6 may be punished as a contempt of court.

"(2) Exceptions.—

"(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—

"(i) an attorney for the government for use in the performance of such attorney's duty; and

"(ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce Federal criminal law.

"(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce Federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made.

"(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

"(i) when so directed by a court preliminarily to or in connection with a judicial proceeding; or

"(ii) when permitted by a court at the request of the defendant, upon

In *United States* v. *Procter & Gamble Co.*, the Court sought to accommodate the competing needs for secrecy and disclosure by ruling that a private party seeking to obtain grand jury transcripts must demonstrate that "without the transcript a defense would be greatly prejudiced or that without reference to it an injustice would be done." 356 U. S., at 682. Moreover, the Court required that the showing of need for the transcripts be made "with particularity" so that "the secrecy of the proceedings [may] be lifted discretely and limitedly." *Id.*, at 683. Accord, *Pittsburgh Plate Glass Co.* v. *United States*, 360 U. S. 395, 400 (1959).

In *Dennis* v. *United States*, 384 U. S. 855 (1966), the Court considered a request for disclosure of grand jury records in quite different circumstances. It was there held to be an abuse of discretion for a District Court in a criminal trial to refuse to disclose to the defendants the grand jury testimony of four witnesses who some years earlier had appeared before a grand jury investigating activities of the defendants. The grand jury had completed its investigation, and the witnesses whose testimony was sought already had testified in public concerning the same matters. The Court noted that "[n]one of the reasons traditionally advanced to justify nondisclosure of grand jury minutes" was significant in those circumstances, *id.*, at 872 n. 18, whereas the defendants had shown it to be likely that the witnesses' testimony at trial was inconsistent with their prior grand jury testimony.

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a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

"(3) Sealed Indictments.—The Federal magistrate to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons."

Although Fed. Rule Crim. Proc. 6 (e) was amended in 1977, all parties agree that the changes do not bear upon the issues in the present case.

From *Procter & Gamble* and *Dennis* emerges the standard for determining when the traditional secrecy of the grand jury may be broken: Parties seeking grand jury transcripts under Rule 6 (e) must show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed.[12] Such a showing must be made even when the grand jury whose transcripts are sought has concluded its operations, as it had in *Dennis*. For in considering the effects of disclosure on grand jury proceedings, the courts must consider not only the immediate effects upon a particular grand jury, but also the possible effect upon the functioning of future grand juries. Persons called upon to testify will consider the likelihood that their testimony may one day be disclosed to outside parties. Fear of future retribution or social stigma may act as powerful deterrents to those who would come forward and aid the grand jury in the performance of its duties. Concern as to the future consequences of frank and full testimony is heightened where the witness is an employee of a company under investigation. Thus, the interests in grand jury secrecy, although reduced, are not eliminated merely because the grand jury has ended its activities.[13]

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[12] As noted in *United States* v. *Procter & Gamble Co.*, 356 U. S., at 683, the typical showing of particularized need arises when a litigant seeks to use "the grand jury transcript at the trial to impeach a witness, to refresh his recollection, to test his credibility and the like." Such use is necessary to avoid misleading the trier of fact. Moreover, disclosure can be limited strictly to those portions of a particular witness' testimony that bear upon some aspect of his direct testimony at trial.

[13] The transcripts sought by respondents already had been given to the target companies in the grand jury investigation. Thus, release to respondents will not enhance the possibility of retaliatory action by employers in this case. But the other factors supporting the presumption of secrecy remain and must be considered.

It is clear from *Procter & Gamble* and *Dennis* that disclosure is appropriate only in those cases where the need for it outweighs the public interest in secrecy, and that the burden of demonstrating this balance rests upon the private party seeking disclosure. It is equally clear that as the considerations justifying secrecy become less relevant, a party asserting a need for grand jury transcripts will have a lesser burden in showing justification. Accord, *Illinois* v. *Sarbaugh,* 552 F. 2d 768, 774 (CA7), cert. denied *sub nom. J. L. Simmons Co.* v. *Illinois,* 434 U. S. 889 (1977); *U. S. Industries, Inc.* v. *United States District Court,* 345 F. 2d 18, 21 (CA9), cert. denied, 382 U. S. 814 (1965); 1 C. Wright, Federal Practice & Procedure § 106, p. 173 (1969). In sum, as so often is the situation in our jurisprudence, the court's duty in a case of this kind is to weigh carefully the competing interests in light of the relevant circumstances and the standards announced by this Court. And if disclosure is ordered, the court may include protective limitations on the use of the disclosed material, as did the District Court in this case. Moreover, we emphasize that a court called upon to determine whether grand jury transcripts should be released necessarily is infused with substantial discretion. See *Pittsburgh Plate Glass Co.* v. *United States, supra,* at 399.

Applying these principles to the present case, we conclude that neither the District Court nor the Court of Appeals erred in the standard by which it assessed the request for disclosure under Rule 6 (e). The District Court made clear that the question before it was whether a particularized need for disclosure outweighed the interest in continued grand jury secrecy. See App. 53–55. Similarly, the Court of Appeals correctly understood that the standard enunciated in *Procter & Gamble* requires a court to examine the extent of the need for continuing grand jury secrecy, the need for disclosure, and

the extent to which the request was limited to that material directly pertinent to the need for disclosure.[14]

III

Petitioners contend, irrespective of the legal standard applied, that the District Court for the Central District of California was not the proper court to rule on respondents' motion for disclosure. Petitioners note that the Court of Appeals and the District Court both purported to base their decisions in part upon the need for use of the requested material in the civil antitrust proceedings pending in Arizona.[15] This determination necessarily involved consideration of the nature and status of the Arizona proceedings, matters peculiarly within the competence of the Arizona District Court.

Although the question is an important one, this Court heretofore has had no occasion to consider which court or courts may direct disclosure of grand jury minutes under Fed. Rule Crim. Proc. 6 (e).[16] The federal courts that have addressed the

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[14] As petitioners point out, the Court of Appeals did say that, because of the circumstances, "the party seeking disclosure should not be required to demonstrate a large compelling need," and that a "minimal showing of particularized need" would suffice. *Petrol Stops Northwest* v. *United States*, 571 F. 2d 1127, 1130 (1978). In a different context, these statements could be read as an unjustified lowering of the standard of proof required by *Procter & Gamble* and *Dennis*. We cannot say, however, that the Court of Appeals applied an incorrect standard in view of the circumstances of this case and the discussion thereof in the opinion below.

[15] The District Court indicated that respondents had made out a "prima facie" showing that the requested materials were relevant to Arizona civil proceedings "because of the nature of the grand jury inquiry with relation to the proceedings here concerned." App. 58. The Court of Appeals found that respondents had shown "a particularized need beyond the mere relevance of the materials [requested]." 571 F. 2d, at 1130.

[16] In each of the three cases in which this Court has considered the applicable standard for disclosure of grand jury transcripts, the court in which the grand jury was empaneled also was the location of the litigation giving rise to the request for disclosure. See, *e. g.*, Juris. Statement in *United States* v. *Procter & Gamble Co.*, O. T. 1957, No. 51, p. 3. Indeed,

question generally have said that the request for disclosure of grand jury minutes under Rule 6 (e) must be directed toward the court under whose auspices the grand jury was empanneled. See *Illinois* v. *Sarbaugh, supra,* at 772–773; *Gibson* v. *United States,* 131 U. S. App. D. C. 143, 144, 403 F. 2d 166, 167 (1968); *Herman Schwabe, Inc.* v. *United Shoe Machinery Corp.,* 21 F. R. D. 233, 235 (DC 1957); accord, 1 Wright, *supra,* § 106, p. 174. But see *United States* v. *American Oil Co.,* 264 F. Supp. 93, 95 (ED Mo. 1966). Indeed, those who seek grand jury transcripts have little choice other than to file a request with the court that supervised the grand jury, as it is the only court with control over the transcripts.[17]

Quite apart from practical necessity, the policies underlying Rule 6 (e) dictate that the grand jury's supervisory court participate in reviewing such requests, as it is in the best position to determine the continuing need for grand jury secrecy. Ideally, the judge who supervised the grand jury should review the request for disclosure, as he will have first-hand knowledge of the grand jury's activities. But even other judges of the district where the grand jury sat may be able

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in *Dennis* v. *United States,* 384 U. S. 855 (1966), and in *Pittsburgh Plate Glass Co.* v. *United States,* 360 U. S. 395 (1959), the parties requested transcripts for use in the criminal case to which the grand jury proceedings had been a prologue.

[17] As we have noted, by virtue of a prior order petitioners have possession of the transcripts sought by respondents. See *supra,* at 216. We were informed at argument by counsel for the Government that under the terms of that order, the transcripts were to be returned upon completion of the criminal proceeding in the Central District of California and were to be used only for purposes of defending against the criminal charges in that case. See Tr. of Oral Arg. 35–36. It appears, therefore, that if the District Court in Arizona had the authority to order disclosure by the petitioners, this power was derived from petitioners' unlawful retention of the transcripts. Indeed, as the Government suggests, it is questionable whether the Arizona District Court properly could have ordered production of the documents in direct violation of the California District Court order.

to discover facts affecting the need for secrecy more easily than would judges from elsewhere around the country. The records are in the custody of the district court, and therefore are readily available for reference. Moreover, the personnel of that court—and particularly those of the United States Attorney's office who worked with the grand jury—are more likely to be informed about the grand jury proceedings than those in a district that had no prior experience with the subject of the request. We conclude, therefore, that, in general, requests for disclosure of grand jury transcripts should be directed to the court that supervised the grand jury's activities.

It does not follow, however, that in every case the court in which the grand jury sat should make the final decision whether a request for disclosure under Rule 6 (e) should be granted. Where, as in this case, the request is made for use in a case pending in another district, the judges of the court having custody of the grand jury transcripts will have no firsthand knowledge of the litigation in which the transcripts allegedly are needed, and no practical means by which such knowledge can be obtained. In such a case, a judge in the district of the grand jury cannot weigh in an informed manner the need for disclosure against the need for maintaining grand jury secrecy. Thus, it may well be impossible for that court to apply the standard required by the decisions of this Court, reiterated above, for determining whether the veil of secrecy should be lifted. See *supra*, at 221–224.

In the *Electrical Equipment Cases*, a federal court contemplated a similar quandary. Following the convictions of 29 heavy electrical equipment manufacturers for price fixing, about 1,900 private damages suits were filed in 34 Federal Districts around the country. See Note, Release of Grand Jury Minutes in the National Deposition Program of the Electrical Equipment Cases, 112 U. Pa. L. Rev. 1133 (1964). During one of these suits, plaintiffs asked the District Court for the Eastern District of Pennsylvania to disclose portions

of a witness' grand jury testimony so that they could be used to refresh the witness' memory during a deposition. *Philadelphia* v. *Westinghouse Electric Corp.*, 210 F. Supp. 486 (ED Pa. 1962). The request was directed to Judge Clary, who had supervised the grand jury and also was in charge of the deposition. He had no difficulty, therefore, setting forth in detail in his opinion both the need for secrecy and the need for disclosure.

Recognizing, however, that the other District Courts in which related actions were pending might face similar requests for the grand jury minutes under his control, Judge Clary outlined a procedure by which parties in the future could put forward such requests. In the court's words:

> "[T]he Grand Jury transcript of any witness deposed in [these suits], either in this district or in any other district of the United States in which these cases are pending, should be made available to the deposition Judge for use in his district. There may be and probably will be many instances during these national depositions when disclosure may be advisable. . . . The refusal [to order disclosure in this case] cannot rule out production where in camera examination by a deposition Judge uncovers material discrepancy or significant facts which the witness concealed, or failed to remember, at his deposition. Such disclosure as is necessary to uncover full and complete facts must be allowed. If, at the completion of any deposition taken in the national program, a motion is made for the production of that witness' Grand Jury testimony, and if the deposition Judge requests it from this Court for examination in camera, the testimony will be immediately made available to him. The deposition Judge may then contrast the Grand Jury testimony with the deposition and determine, in his own discretion, whether in the interest of justice there is compelling need for disclosure." *Id.*, at 491.

Because Judge Clary in his opinion had discussed with care the various secrecy concerns as they applied to the transcripts before him, district courts called upon in the future to rule upon disclosure motions could weigh these concerns against the need for disclosure. In this way, the court provided precisely what was required by the situation: a coordinating of the informed views of both the civil trial court and the grand jury court concerning the propriety of disclosing portions of the grand jury minutes. Several other federal courts, recognizing the need for collaboration, have devised means by which both the court of the grand jury and the court of the collateral civil proceeding may participate in the decision whether transcripts should be released under Rule 6 (e). See *In re 1975–2 Grand Jury Investigation*, 566 F. 2d 1293, 1296 (CA5 1978); *Illinois* v. *Sarbaugh*, 552 F. 2d, at 773 n. 5; *Baker* v. *United States Steel Corp.*, 492 F. 2d 1074, 1076–1077 (CA2 1974); *Gibson* v. *United States*, 131 U. S. App. D. C., at 144–145, 403 F. 2d, at 167–168.

In the present case, the District Court for the Central District of California was called upon to make an evaluation entirely beyond its expertise. The District Judge readily conceded that he had no knowledge of the civil proceedings pending several hundred miles away in Arizona. App. 58. Nonetheless, he was asked to rule whether there was a "particularized need" for disclosure of portions of the grand jury transcript and whether this need outweighed the need for continued grand jury secrecy. Generally we leave it to the considered discretion of the district court to determine the proper response to requests for disclosure under Rule 6 (e). See *Pittsburgh Plate Glass Co.* v. *United States*, 360 U. S., at 399. We have a duty, however, to guide the exercise of discretion by district courts, and when necessary to overturn discretionary decisions under Rule 6 (e). See, *e. g.*, *Dennis* v. *United States*, 384 U. S. 855 (1966).

We find that the District Court here abused its discretion in releasing directly to respondents the grand jury minutes

they requested. Appreciating that it was largely ignorant of the Arizona civil suits, the court nonetheless made a judgment concerning the relative needs for secrecy and disclosure.[18] The court based its decision largely upon the unsupported assertions of counsel during oral argument before it, supplemented only by the criminal indictment returned by the grand jury, the civil complaints, and petitioners' response to a single interrogatory that appeared to be inconsistent with petitioners' *nolo contendere* plea in the criminal case. Even the court's comparison of the criminal indictment and the civil complaints did not indicate unambiguously what, if any, portions of the grand jury transcripts would be pertinent to the subject of the Arizona actions, as only some of the same parties were named and only some of the same territory was covered.

The possibility of an unnecessary breach of grand jury secrecy in situations such as this is not insignificant. A court more familiar with the course of the antitrust litigation might have seen important differences between the allegations of the indictment and the contours of the conspiracy respondents sought to prove in their civil actions—differences indicating that disclosure would likely be of little value to respondents, save perhaps as a mechanism for general discovery. Alterna-

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[18] Indeed, the court indicated that it was equally ignorant of the circumstances surrounding the grand jury proceedings. See App. 53. Thus, it appears that this particular judge had no knowledge whatsoever of the facts underlying either the criminal or civil proceedings, and so was in no position to consider the relationship between the two.

Contrary to the statements in the dissenting opinion, *post*, at 235 n. 3, and 236 n. 8, we do not "admonish [the] trial judge" by concluding that there was an abuse of discretion. We recognize that the proper procedure in a case of this kind had not been established in the Ninth Circuit or by this Court at the time of the trial court's ruling. Thus, the trial court—whose lot it was to act on respondents' request—had neither authoritative guidance as to the proper procedure to be followed nor familiarity with the civil or criminal proceedings. One purpose of our decision today is to afford such guidance in cases of this kind.

tively, the courts where the civil proceedings were pending might have considered disclosure at that point in the litigation to be premature; if there were to be conflicts between petitioners' statements and their actions in the criminal proceedings, the court might have preferred to wait until they ripened at depositions or even during testimony at trial.

Under these circumstances, the better practice would have been for the District Court, after making a written evaluation of the need for continued grand jury secrecy and a determination that the limited evidence before it showed that disclosure might be appropriate, to send the requested materials to the court where the civil cases were pending.[19] The Arizona court, armed with its special knowledge of the status of the civil actions, then could have considered the requests for disclosure in light of the California court's evaluation of the need

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[19] Apparently recognizing his difficult position, the District Judge in the present case at one point offered, "through an overabundance of precaution . . . to telephone [the judges presiding over the Arizona proceedings] to see if they have any objection" to the release to respondents of the grand jury transcripts. Contrary to the suggestion in the dissenting opinion, see *post*, at 235 n. 3, this offer was no suitable substitute for referring the matter to the Arizona District Court: An oral request made over the telephone to a busy District Judge cannot be considered with the same care and understanding that formal motions properly receive. Under the suggested informal procedure the Arizona District Court would have been required to evaluate the need for disclosure without having either access to the grand jury materials or firsthand knowledge of what they contained.

The dissenting opinion argues that petitioners' failure to demand reference to the Arizona court justified the District Court's granting respondents' discovery request regardless of its implications. See *ibid.* With respect to grand jury secrecy, a matter of great sensitivity impinging upon the public interest, courts cannot be free to act merely because the parties have failed to specify precisely the relief to which they are entitled. Such *carte blanche* is particularly inappropriate in the present case, where petitioners argued before the District Court that it lacked the expertise required to make a fair determination of the need for disclosure. The issue upon which we rule today, therefore, was presented to the District Court by petitioners.

for continued grand jury secrecy. In this way, both the need for continued secrecy and the need for disclosure could have been evaluated by the courts in the best position to make the respective evaluations.[20]

We do not suggest, of course, that such a procedure would be required in every case arising under Rule 6 (e). Circumstances that dictate the need for cooperative action between the courts of different districts will vary, and procedures to deal with the many variations are best left to the rulemaking procedures established by Congress. Undoubtedly there will be cases in which the court to whom the Rule 6 (e) request is directed will be able intelligently, on the basis of limited knowledge, to decide that disclosure plainly is inappropriate or that justice requires immediate disclosure to the requesting party, without reference of the matter to any other court. Our decision today therefore is restricted to situations, such as that presented by this case, in which the district court having custody of the grand jury records is unlikely to have dependable knowledge of the status of, and the needs of the parties in, the civil suit in which the desired transcripts are to be used.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE REHNQUIST, concurring.

I join the Court's opinion because I agree with its conclusions on the merits of the issue of the availability of the grand jury transcripts to these private treble-damages action plaintiffs. I do not feel that the Court can leave

[20] Because the District Court for the Central District of California did not have the knowledge necessary to make an evaluation of the relative needs for secrecy and disclosure, we express no view whether on these facts a court with such knowledge properly could have ordered release of the requested transcripts.

entirely unnoticed, however, the total absence of any reference by either of the parties or by the Court of Appeals to the basis upon which that court took jurisdiction of the petitioners' "appeal" from the order of the District Court granting access to the grand jury minutes. At the same time, I am handicapped in formulating a view of my own on the subject, because of the absence of any assistance from the parties or any consideration of the question by the Court of Appeals or by this Court. But in order for us to have jurisdiction over the case, the case must be properly "in" the Court of Appeals for purposes of 28 U. S. C. § 1254. *Liberty Mutual Life Ins. Co.* v. *Wetzel*, 424 U. S. 737 (1976). And it may well be that the availability to the losing party of a right to appeal an order such as this may be a factor in deciding whether the proceedings should ultimately be treated as part of the discovery in the court in which the treble-damages action is pending, or as a separate proceeding in the court which conducted the grand jury proceeding.

This case is not like *United States* v. *Procter & Gamble Co.*, 356 U. S. 677 (1958). In *Procter & Gamble*, the defendants in a civil action brought by the Government sought discovery of grand jury minutes pursuant to Fed. Rule Civ. Proc. 34.* The District Court granted discovery, and the Government deliberately took a default in order to obtain review of the discovery ruling in the course of its appeal from a "final judgment" of the District Court pursuant to 15 U. S. C. § 29. 356 U. S., at 680. But absent such extraordinary circumstances, our cases and those of the Courts of Appeals hold that review of the granting or denial of discovery is not immediately reviewable, except perhaps by way of mandamus for gross abuse of discretion on the part of the trial court. See, *e. g.*, *Cobbledick* v. *United States*, 309 U. S. 323 (1940).

*Only one defendant moved for discovery of the minutes under Fed. Rule Crim. Proc. 6 (e). 356 U. S., at 678 n. 1. The Court's discussion of the merits of the defendants' claims was based on Fed. Rule Civ. Proc. 34. 356 U. S., at 681.

Two Courts of Appeals have taken different approaches to the issue of appealability of orders regarding disclosure of grand jury minutes. Compare *Baker* v. *United States Steel Corp.*, 492 F. 2d 1074 (CA2 1974), with *Illinois* v. *Sarbaugh*, 552 F. 2d 768 (CA7), cert. denied *sub nom. J. L. Simmons Co.* v. *Illinois*, 434 U. S. 889 (1977). Since all that is presented to us in this case is an effort to obtain appellate review of an order by the court having custody of the grand jury transcript directing that the transcript be turned over to a party applying for it, different factual permutations which might raise and require different analysis in terms of appealability need not be decided. For example, I am not at all sure that an order of the grand jury court transferring the transcripts to the civil court, as contemplated by the Court's decision, *ante*, at 230, would be appealable. See *Baker* v. *United States Steel Corp.*, *supra*. Nor am I certain that I would agree with the analysis of the Court of Appeals for the Seventh Circuit in *Illinois* v. *Sarbaugh*, *supra*, as to the authority under which the district court exercises jurisdiction in this type of case. Nonetheless, I believe that since an order such as is involved in this case disposes of all of the contentions of the parties and terminates a separate proceeding pending before the grand jury court, it is therefore appealable as a "final decision" under 28 U. S. C. § 1291. See *Illinois* v. *Sarbaugh*, *supra*, at 773. If I am correct in this conclusion, this case was "in the court of appeals" from the time that petitioners filed their notice of appeal from the order of the District Court, and we may therefore exercise our certiorari jurisdiction granted by 28 U. S. C. § 1254. Satisfied at least for now with this analysis of the jurisdictional predicate to the case, I join the Court's opinion on the merits.

MR. JUSTICE STEVENS, with whom THE CHIEF JUSTICE and MR. JUSTICE STEWART join, dissenting.

Although I join all but the last nine paragraphs of the Court's opinion, I cannot agree with the conclusion that the

District Judge sitting in the Central District of California should not have granted access to the grand jury transcripts subject to the conditions stated in his order. More fundamentally, I do not share the Court's readiness to review the District Judge's exercise of his broad discretion in this matter in the absence of any allegation of egregious abuse on his part and in the face of the confirmation of his conclusion by the Court of Appeals.[1]

Before he acted, the District Judge allowed petitioners to participate as real parties in interest in order to explain their opposition to disclosure of the transcripts,[2] he offered to communicate with the District Judges in Arizona,[3] he obtained

[1] The Court of Appeals affirmed the determination of the District Judge on the basis of the record before him showing the similarities between the indictment to which petitioners had pleaded no contest and the complaint in the treble-damages case. But the Court of Appeals went even further. On the basis of additional submissions by the parties on appeal, the Court of Appeals made a further finding of relevance premised on discrepancies between the bill of particulars filed by the Government in the criminal case and recent deposition testimony of petitioners' employees in the civil case. *Petrol Stops Northwest* v. *United States*, 571 F. 2d 1127, 1130–1131. Accordingly, the decision of the Court second-guesses not only the District Judge's determination as affirmed by the Court of Appeals on its own terms, but also a second *de novo* determination by the Court of Appeals based on additional information.

[2] Because the grand jury transcripts were in the possession of the United States, it was the nominal respondent in the action seeking disclosure of those transcripts. Although the Government did not oppose release of the transcripts, it did encourage the District Judge to allow petitioners to participate in the hearing as the "real parties in interest," and the court acceded to the Government's suggestion. App. 52, 90–100.

[3] Petitioners consistently argued in the District Court that respondents' motion for production of the transcripts under Fed. Rule Crim. Proc. 6 (e) should be denied outright and respondents forced to pursue the request in the Arizona courts by way of motions to compel discovery under Fed. Rule Civ. Proc. 37. In response to petitioners' argument that the two District Judges in Arizona were the only appropriate recipients of respondents' disclosure requests, the District Judge made the following statement:

"I would be very glad through an overabundance of precaution, if you

the views of the Antitrust Division of the Department of Justice,[4] and he compared the charges in the indictment with the allegations in the complaint for treble damages.[5] Everything called to his attention by respondents supported the conclusion that the grand jury transcripts would be highly relevant in the civil litigation,[6] and petitioners not only made no concrete showing of irrelevance in rebuttal,[7] but also passed

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think it would be appropriate, to telephone Judge Walsh and Judge Frey to see if they have any objection, but it doesn't seem to me that I should relegate these people to make their application to those judges when they have taken what I think is a proper step in coming here." App. 56.

Instead of responding that it *would* be "appropriate" for the judge to communicate with the judges in Arizona, counsel for petitioners once again reiterated the argument—implicitly rejected by the Court in today's decision—that the District Judge should simply have denied the Criminal Rule 6 (e) request and relegated the entire matter to the Arizona judges for decision under Civil Rule 37. See *ante*, at 226. The fact that petitioners relied exclusively on this admittedly invalid objection to the production request should bar them from making the new argument in this Court that the District Judge should have transferred the Rule 6 (e) motion to the Arizona courts. Even if that argument is cognizable here, I find inexplicable the Court's determination that the District Judge abused his discretion because the accommodation he suggested *sua sponte*—orally communicating with the judges in Arizona about the Rule 6 (e) motion and announcing their collective decision himself—is not the slightly different one that a majority of this Court would have chosen—formally transferring the Rule 6 (e) motion to the Arizona judges and forcing them to announce the collective decisions. See *ante*, at 230–231.

[4] See App. 52, 61.

[5] See *id.*, at 57–59, 118–167. See also 571 F. 2d., at 1131.

[6] The District Judge found as follows:

"As far as relevance, I would think that there is a prima facie relevance because of the nature of the grand jury inquiry with relation to the proceedings here concerned." App. 58.

[7] According to their counsel, the "main thrust" of petitioners' argument before the District Judge was not that the transcripts are irrelevant to the treble-damages suit. Instead, petitioners' primary reliance was on the incorrect argument, see *ante*, at 226, that respondents should have presented their request to the Arizona judges in the first instance. App. 55–

up two procedural opportunities to make such a showing.[8] Since the transcripts had already been released to the defendants, no interest in protecting witnesses from possible retaliation remained. The Government foresaw no other secrecy problems.

Had I been the District Judge presented with respondents' request, I would have exercised my discretion in the same way he did. In light of today's holding, it now appears that I would have been wrong. But I do not find the Court's view on the merits of the decision below nearly as troubling as its expansive view of its appellate function in this area in which trial judges usually have broad latitude.[9] Whatever its validity, the decision of the District Judge as affirmed by the Court

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56. When they did reach the subject of relevance, petitioners' comments were tentative at best. See, *e. g., id.*, at 57 (emphasis added):

"MR. THURSTON [counsel for Douglas Oil]: . . . It is possible that there were—not possible. It is the fact that those grand jury proceedings concerned a number of different levels of sale, both at the wholesale and retail levels, whereas the proceedings in Arizona *may* not involve such a broad territory."

[8] In addition to accepting the District Judge's offer to consult with the Arizona judges on the subject of relevance, see n. 3, *supra*, petitioners could have requested that the District Judge view the transcripts *in camera* to test their relevance. See *Dennis* v. *United States*, 384 U. S. 855, 874. In this discretionary area, it is particularly harsh to admonish a trial judge for failing to take steps that even the parties have not suggested should be taken.

[9] Although the Court recognizes that it is customary for Rule 6 (e) determinations to be left to the "considered discretion" of the lower courts, *ante*, at 228, citing *Pittsburgh Plate Glass Co.* v. *United States*, 360 U. S. 395, 399, it finds support in *Dennis* v. *United States*, *supra*, for its rather exacting review of the exercise of that discretion. But in *Dennis*, the District Court had *withheld* grand jury testimony from a *criminal* defendant and had thereby run afoul of the view "that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of *criminal* justice." 384 U. S., at 870–871 (emphasis added), citing *Jencks* v. *United States*, 353 U. S. 657. See also *Brady* v. *Maryland*, 373

of Appeals was surely not very wide of the mark. Accordingly, for the Court to overturn that decision is to move decisively in the direction of equating an "abuse of discretion" with an exercise of discretion with which it disagrees. I cannot join in this rearrangement of the respective roles of trial and appellate courts.

U. S. 83. Because the permissible scope of discretion in this civil litigation is not qualified by any special policy analogous to the one favoring disclosure in *Dennis*, I find little support in that case for the result reached here.

DALIA *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 77–1722. Argued January 9, 10, 1979—Decided April 18, 1979

Pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, the District Court, finding probable cause to believe that petitioner was a member of a conspiracy the purpose of which was to steal goods being shipped in interstate commerce, granted the Government's request for authorization to intercept all oral communications taking place in petitioner's business office. Petitioner was subsequently convicted of receiving stolen goods and conspiring to transport, receive, and possess stolen goods. At a hearing on his motion to suppress evidence obtained under the bugging order, it was shown that although such order did not explicitly authorize entry of petitioner's business office, FBI agents had entered the office secretly at midnight on the day of the bugging order and had spent three hours installing an electronic bug in the ceiling. Denying petitioner's motion to suppress, the District Court ruled that under Title III a covert entry to install electronic eavesdropping equipment is not unlawful merely because the court approving the surveillance did not explicitly authorize such an entry. Affirming petitioner's conviction, the Court of Appeals rejected his contention that separate court authorization was necessary for the covert entry of his office.

Held:

1. The Fourth Amendment does not prohibit *per se* a covert entry performed for the purpose of installing otherwise legal electronic bugging equipment. Implicit in decisions such as *Irvine* v. *California*, 347 U. S. 128, and *Silverman* v. *United States*, 365 U. S. 505, has been this Court's view that covert entries are constitutional in some circumstances, at least if they are made pursuant to warrant. Petitioner's argument that covert entries are unconstitutional for their lack of notice is frivolous, as was indicated in *Katz* v. *United States*, 389 U. S. 347, 355 n. 16, where this Court stated that "officers need not announce their purpose before conducting an otherwise [duly] authorized search if such an announcement would provoke the escape of the suspect or the destruction of critical evidence." Pp. 246–248.

2. Congress has given the courts statutory authority to approve covert entries for the purpose of installing electronic surveillance equipment. Although Title III does not refer explicitly to covert entry, the language,

structure, purpose, and history of the statute demonstrate that Congress meant to authorize courts—in certain specified circumstances—to approve electronic surveillance without limitation on the means necessary to its accomplishment, so long as they are reasonable under the circumstances. Congress clearly understood that it was conferring power upon the courts to authorize covert entries ancillary to their responsibility to review and approve surveillance applications under the statute. Pp. 249–254.

3. The Fourth Amendment does not require that a Title III electronic surveillance order include a specific authorization to enter covertly the premises described in the order. Pp. 254–259.

(a) The Warrant Clause of the Fourth Amendment requires only that warrants be issued by neutral, disinterested magistrates, that those seeking the warrant must demonstrate to the magistrate their probable cause to believe that the evidence sought will aid in a particular apprehension or conviction for a particular offense, and that warrants must particularly describe the things to be seized, as well as the place to be searched. Here, the bugging order was a warrant issued in full compliance with these traditional Fourth Amendment requirements. Pp. 255–256.

(b) Nothing in the language of the Constitution or in this Court's decisions interpreting that language suggests that, in addition to these requirements, search warrants also must include a specification of the precise manner in which they are to be executed. On the contrary, it is generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by warrant—subject to the general Fourth Amendment protection "against unreasonable searches and seizures." Pp. 256–257.

(c) An interpretation of the Warrant Clause so as to require that, whenever it is reasonably likely that Fourth Amendment rights may be affected in more than one way, the court must set forth precisely the procedures to be followed by the executing officers, is unnecessary, since the manner in which a warrant is executed is subject to later judicial review as to its reasonableness. More important, it would promote empty formalism were this Court to require magistrates to make explicit what unquestionably is implicit in bugging authorizations: that a covert entry, with its attendant interference with Fourth Amendment interests, may be necessary for the installation of the surveillance equipment. Pp. 257–258.

575 F. 2d 1344, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, and REHNQUIST, JJ., joined and in Parts I and II

of which BRENNAN and STEWART, JJ., joined. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which STEWART, J., joined except as to Part I, *post*, p. 259. STEVENS, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 262.

Louis Ruprecht argued the cause and filed a brief for petitioner.

Deputy Solicitor General Frey argued the cause for the United States. With him on the brief were *Solicitor General McCree, Assistant Attorney General Heymann, William C. Bryson, Kenneth S. Geller,* and *Jerome M. Feit.*

MR. JUSTICE POWELL delivered the opinion of the Court.

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Title III), 18 U. S. C. §§ 2510–2520, permits courts to authorize electronic surveillance[1] by Government officers in specified situations. We took this case by writ of

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[1] All types of electronic surveillance have the same purpose and effect: the secret interception of communications. As the Court set forth in *Berger* v. *New York*, 388 U. S. 41, 45–47 (1967), however, this surveillance is performed in two quite different ways. Some surveillance is performed by "wiretapping," which is confined to the interception of communication by telephone and telegraph and generally may be performed from outside the premises to be monitored. For a detailed description, see Note, Minimization of Wire Interception: Presearch Guidelines and Postsearch Remedies, 26 Stan. L. Rev. 1411, 1414 n. 18 (1974). At issue in the present case is the form of surveillance commonly known as "bugging," which includes the interception of all oral communication in a given location. Unlike wiretapping, this interception typically is accomplished by installation of a small microphone in the room to be bugged and transmission to some nearby receiver. See McNamara, The Problem of Surreptitious Entry to Effectuate Electronic Eavesdrops: How Do You Proceed After the Court Says "Yes"?, 15 Am. Crim. L. Rev. 1, 2 (1977); Blakey, Aspects of the Evidence Gathering Process in Organized Crime Cases: A Preliminary Analysis, reprinted in the President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Organized Crime, App. C, 92, 97 (1967). Both wiretapping and bugging are regulated under Title III. See 18 U. S. C. §§ 2510 (1) and (2).

certiorari to resolve two questions concerning the implementation of Title III surveillance orders. 439 U. S. 817. First, may courts authorize electronic surveillance that requires covert entry [2] into private premises for installation of the necessary equipment? Second, must authorization for such surveillance include a specific statement by the court that it approves of the covert entry? [3]

I

On March 14, 1973, Justice Department officials applied to the United States District Court for the District of New Jersey, seeking authorization under 18 U. S. C. § 2518 to intercept telephone conversations on two telephones in petitioner's business office. After examining the affidavits submitted in support of the Government's request, the District Court authorized the wiretap for a period of 20 days or until the purpose of the interception was achieved, whichever came first. The court found probable cause to believe that petitioner was a member of a conspiracy the purpose of which was to steal goods being shipped in interstate commerce in violation of 18 U. S. C. § 659. Moreover, the court found reason to believe that petitioner's business telephones were being used to further this conspiracy and that means of investigating the conspiracy

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[2] Every electronic surveillance necessarily is "covert" in the sense that it must be "hidden; secret; disguised" to be effective. Webster's New International Dictionary 613 (2d ed. 1953). As used here, "covert entry" refers to the physical entry by a law enforcement officer into private premises without the owner's permission or knowledge in order to install bugging equipment. Generally, such an entry will require a breaking and entering. See discussion *infra*, at 253–254.

[3] The Federal Courts of Appeals have given conflicting answers to these questions. See *United States* v. *Finazzo*, 583 F. 2d 837 (CA6 1978); *United States* v. *Santora*, 583 F. 2d 453 (CA9 1978); *United States* v. *Scafidi*, 564 F. 2d 633 (CA2 1977), cert. denied, 436 U. S. 903 (1978); *United States* v. *Ford*, 180 U. S. App. D. C. 1, 553 F. 2d 146 (1977); *United States* v. *Agrusa*, 541 F. 2d 690 (CA8 1976), cert. denied, 429 U. S. 1045 (1977).

other than electronic surveillance would be unlikely to succeed and would be dangerous. The wiretap order carefully enumerated the telephones to be affected and the types of conversations to be intercepted. Finally, the court ordered the officials in charge of the interceptions to take all reasonable precautions "to minimize the interception of communications not otherwise subject to interception," and required the officials to make periodic progress reports.

At the end of the 20-day period covered by the March 14 court order, the Government requested an extension of the wiretap authorization. In addition, the Government for the first time asked the court to allow it to intercept all oral communications taking place in petitioner's office, including those not involving the telephone. On April 5, 1973, the court granted the Government's second request. Its order concerning the wiretap of petitioner's telephones closely tracked the March 14 order. Finding reasonable cause to believe that petitioner's office was being used by petitioner and others in connection with the alleged conspiracy, the court also authorized, for a maximum period of 20 days, the interception of all oral communications concerning the conspiracy at "the business office of Larry Dalia, consisting of an enclosed room, approximately fifteen (15) by eighteen (18) feet in dimension, and situated in the northwesterly corner of a one-story building housing Wrap-O-Matic Machinery Company, Ltd., and Precise Packaging, and located at 1105 West St. George Avenue, Linden, New Jersey." The order included protective provisions similar to those in the March 14 wiretapping order.[4] The electronic surveillance order of April 5 was extended by court order on April 27, 1973.

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[4] In relevant part, the Title III order of April 5 provided:

"[T]he Court finds:

"(a) There is probable cause to believe that Larry Dalia and others as yet unknown, have committed and are committing offenses involving theft from interstate shipments, in violation of Title 18, United States Code,

On November 6, 1975, petitioner was indicted in a five-count indictment charging that he had been involved in a

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Section 659; sale or receipt of stolen goods, in violation of Title 18, United States Code, Section 2315; and interference with commerce by threats or violence, in violation of Title 18, United States Code, Section 1951; and are conspiring to commit such offenses in violation of Section 371 of Title 18, United States Code.

"(b) There is probable cause to believe that particular wire and oral communications concerning these offenses will be obtained through these interceptions, authorization for which is herewith applied. In particular, these wire and oral communications will concern the theft or robbery of goods moving in interstate commerce, and the transportation, sale, receipt, storage, or distribution of these stolen goods, and the participants in the commission of said offenses.

"(c) Normal investigative procedures reasonably appear to be unlikely to succeed and are too dangerous to be used.

. . . . .

"(e) There is probable cause to believe that the business office of Larry Dalia, consisting of an enclosed room, approximately fifteen (15) by eighteen (18) feet in dimension, and situated in the northwesterly corner of a one-story building housing Wrap-O-Matic Machinery Company, Ltd., and Precise Packaging, and located at 1105 West St. George Avenue, Linden, New Jersey, has been used, and is being used by Larry Dalia and others as yet unknown in connection with the commission of the above-described offenses.

"WHEREFORE, it is hereby ordered that:

"Special Agents of the Federal Bureau of Investigation, United States Department of Justice, are authorized . . . to:

. . . . .

"(b) Intercept oral communications of Larry Dalia, and others as yet unknown, concerning the above-described offenses at the business office of Larry Dalia, consisting of an enclosed room, approximately fifteen (15) by eighteen (18) feet in dimension, and situated in the northwesterly corner of a one-story building housing Wrap-O-Matic Machinery Company, Ltd., and Precise Packaging, and located at 1105 West St. George Avenue, Linden, New Jersey.

"(c) Such interceptions shall not automatically terminate when the type of communication described above in paragraphs (a) and (b) have first been obtained, but shall continue until communications are intercepted which reveal the manner in which Larry Dalia and others as yet unknown

conspiracy to steal an interstate shipment of fabric.[5] At trial, the Government introduced evidence showing that petitioner had been approached in March 1973 and asked to store in his New Jersey warehouse "a load of merchandise." Although petitioner declined the request, he directed the requesting party to Higgins, an associate, with whom he agreed to share the $1,500 storage fee that was offered. The merchandise stored under this contract proved to be a tractor-trailer full of fabric worth $250,000 that three men stole on April 3, 1973, and transported to Higgins' warehouse. Two days after the theft, FBI agents arrested Higgins and the individuals involved in the robbery.

The Government introduced into evidence at petitioner's trial various conversations intercepted pursuant to the court

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participate in theft from interstate shipments; sale or receipt of stolen goods; and interference with commerce by threats or violence; and which reveal the identities of his confederates, their places of operation, and the nature of the conspiracy involved therein, or for a period of twenty (20) days from the date of this Order, whichever is earlier.

. . . . .

"PROVIDING THAT, this authorization to intercept oral and wire communications shall be executed as soon as practicable after signing of this Order and shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under Chapter 119 of Title 18 of the United States Code, and must terminate upon attainment of the authorized objective, [or] in any event, at the end of twenty (20) days from the date of this Order.

"PROVIDING ALSO, that Special Attorney James M. Deichert shall provide the Court with a report on the fifth, tenth, and fifteenth day following the date of this Order showing what progress has been made toward achievement of the authorized objective and the need for continued interception."

[5] Count one charged petitioner and others with conspiring to transport, receive, and possess stolen goods in violation of 18 U. S. C. §§ 2, 2314, 2115, and 659. Count two charged petitioner and others with conspiring to obstruct interstate commerce in violation of 18 U. S. C. § 1951 (b)(1). Count three charged that petitioner had transported stolen goods; count four charged that he had received stolen goods; and count five charged petitioner with possession of stolen goods.

orders of March 14, April 5, and April 27, 1973. Intercepted telephone conversations showed that petitioner had arranged for the storage at Higgins' warehouse and had helped negotiate the terms for that storage. One telephone conversation that took place after Higgins' arrest made clear that petitioner had given advice to others involved in the robbery to "sit tight" and not to use the telephone. Finally, the Government introduced transcripts of conversations intercepted from petitioner's office under the April 5 bugging order. In these conversations, petitioner had discussed with various participants in the robbery how best to proceed after their confederates had been arrested. The unmistakable inference to be drawn from petitioner's statements in these conversations is that he was an active participant in the scheme to steal the truckload of fabric.

Before trial, petitioner moved to suppress evidence obtained through the interception of conversations by means of the device installed in his office. The District Court denied the suppression motion without prejudice to its being renewed following trial. After petitioner was convicted on two counts,[6] he renewed his motion and the court held an evidentiary hearing concerning the method by which the electronic device had been installed. At this hearing it was shown that, although the April 5 court order did not explicitly authorize entry of petitioner's business, the FBI agents assigned the task of implementing the order had entered petitioner's office secretly at midnight on April 5 and had spent three hours in the building installing an electronic bug in the ceiling. All electronic surveillance of petitioner ended on May 16, 1973, at which time the agents re-entered petitioner's office and removed the bug.

In denying a second time petitioner's motion to suppress the evidence obtained from the bug, the trial court ruled

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[6] Petitioner was convicted of receiving stolen goods and conspiring to transport, receive, and possess stolen goods. See n. 5, *supra*.

that under Title III a covert entry to install electronic eavesdropping equipment is not unlawful merely because the court approving the surveillance did not explicitly authorize such an entry. 426 F. Supp. 862 (1977). Indeed, in the court's view, "implicit in the court's order [authorizing electronic surveillance] is concomitant authorization for agents to covertly enter the premises in question and install the necessary equipment." *Id.*, at 866. As the court concluded that the FBI agents who had installed the electronic device were executing a lawful warrant issued by the court, the sole question was whether the method they chose for execution was reasonable. Under the circumstances, the court found the covert entry of petitioner's office to have been "the safest and most successful method of accomplishing the installation." *Ibid.* Indeed, noting that petitioner himself had indicated that such a device could only have been installed through such an entry, the court observed that "[i]n most cases the only form of installing such devices is through breaking and entering. The nature of the act is such that entry must be surreptitious and must not arouse suspicion, and the installation must be done without the knowledge of the residents or occupants." *Ibid.*

The Court of Appeals for the Third Circuit affirmed petitioner's conviction. 575 F. 2d 1344 (1978). Agreeing with the District Court, it rejected petitioner's contention that separate court authorization was necessary for the covert entry of petitioner's office, although it noted that "the more prudent or preferable approach for government agents would be to include a statement regarding the need of a surreptitious entry in a request for the interception of oral communications when a break-in is contemplated." *Id.*, at 1346–1347.

II

Petitioner first contends that the Fourth Amendment prohibits covert entry of private premises in all cases, irrespective of the reasonableness of the entry or the approval of a court.

He contends that Title III is unconstitutional insofar as it enables courts to authorize covert entries for the installation of electronic bugging devices.

In several cases this Court has implied that in some circumstances covert entry to install electronic bugging devices would be constitutionally acceptable if done pursuant to a search warrant. Thus, for example, in *Irvine* v. *California*, 347 U. S. 128 (1954), the plurality stated that in conducting electronic surveillance, state police officers had "flagrantly, deliberately, and persistently violated the fundamental principle declared by the Fourth Amendment as a restriction on the Federal Government." *Id.*, at 132. It emphasized that the bugging equipment was installed through a covert entry of the defendant's home "*without a search warrant* or other process." *Ibid.* (emphasis added). Similarly, in *Silverman* v. *United States*, 365 U. S. 505, 511–512 (1961), it was noted that "[t]his Court has never held that a federal officer may *without warrant* and without consent physically entrench into a man's office or home, there secretly observe or listen, and relate at the man's subsequent criminal trial what was seen or heard." (Emphasis added.) Implicit in decisions such as *Silverman* and *Irvine* has been the Court's view that covert entries are constitutional in some circumstances, at least if they are made pursuant to warrant.

Moreover, we find no basis for a constitutional rule proscribing all covert entries. It is well established that law officers constitutionally may break and enter to execute a search warrant where such entry is the only means by which the warrant effectively may be executed. See, *e. g.*, *Payne* v. *United States*, 508 F. 2d 1391, 1394 (CA5 1975); cf. *Ker* v. *California*, 374 U. S. 23, 28, 38 (1963); 18 U. S. C. § 3109. Petitioner nonetheless argues that covert entries are unconstitutional for their lack of notice. This argument is frivolous, as was indicated in *Katz* v. *United States*, 389 U. S. 347, 355 n. 16 (1967), where the Court stated that "officers need not

announce their purpose before conducting an otherwise [duly] authorized search if such an announcement would provoke the escape of the suspect or the destruction of critical evidence." [7] In *United States* v. *Donovan*, 429 U. S. 413, 429 n. 19 (1977), we held that Title III provided a constitutionally adequate substitute for advance notice by requiring that once the surveillance operation is completed the authorizing judge must cause notice to be served on those subjected to surveillance. See 18 U. S. C. § 2518 (8)(d). There is no reason why the same notice is not equally sufficient with respect to electronic surveillances requiring covert entry. We make explicit, therefore, what has long been implicit in our decisions dealing with this subject: The Fourth Amendment does not prohibit *per se* a covert entry performed for the purpose of installing otherwise legal electronic bugging equipment.[8]

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[7] One authority has said that the constitutional validity of covert entries to install bugs "is plainly the consequence of [the] reasoning" of *Katz* v. *United States*. T. Taylor, Two Studies in Constitutional Interpretation 114 (1969).

[8] Petitioner argues that, even if a covert entry would be constitutional in some cases, it was not in the present case, as there was no need for such entry. The District Court, however, specifically found that the "safest and most successful method of accomplishing the installation of the wiretapping device was through breaking and entering [the office]." 426 F. Supp. 862, 866 (1977). Moreover, in issuing the Title III order, the court found that "[n]ormal investigative procedures reasonably appear to be unlikely to succeed and are too dangerous to be used." App. 7a. And in his opinion denying petitioner's subsequent suppression motion, the same judge stated:

"The affidavits which supported the application for the warrant in question indicated that resort to electronic surveillance, to overhear meetings at Dalia's office and conversations on Dalia's telephones, was required to identify the sources of Dalia's stolen goods, those working with him to transport and store stolen property, and the scope of the conspiracy. Oral evidence of this criminal enterprise was only available inside Dalia's business premises." 426 F. Supp., at 866.

The District Court, therefore, concluded that the circumstances required

III

Petitioner's second contention is that Congress has not given the courts statutory authority to approve covert entries for the purpose of installing electronic surveillance equipment, even if constitutionally it could have done so. Petitioner emphasizes that although Title III sets forth with meticulous care the circumstances in which electronic surveillance is permitted, there is no comparable indication in the statute that covert entry ever may be ordered. Accord, *United States* v. *Santora*, 583 F. 2d 453, 457–458 (CA9 1978).

Title III does not refer explicitly to covert entry. The language, structure, and history of the statute, however, demonstrate that Congress meant to authorize courts—in certain specified circumstances—to approve electronic surveillance without limitation on the means necessary to its accomplishment, so long as they are reasonable under the circumstances. Title III provides a comprehensive scheme for the regulation of electronic surveillance, prohibiting all secret interception of communications except as authorized by certain state and federal judges in response to applications from specified federal and state law enforcement officials. See 18 U. S. C. §§ 2511, 2515, and 2518; *United States* v. *United States District Court*, 407 U. S. 297, 301–302 (1972). Although Congress was fully aware of the distinction between bugging and wiretapping, see S. Rep. No. 1097, 90th Cong., 2d Sess., 68 (1968), Title III by its terms deals with each form of surveillance in essentially the same manner. See 18 U. S. C. §§ 2510 (1) and (2); n. 1, *supra*. Orders authorizing interceptions of either wire or oral communications may be entered only after the court has made specific determinations concerning the likelihood that the interception will disclose evidence of criminal conduct. See 18 U. S. C. § 2518 (3). Moreover, with respect to both wiretapping and bugging, an authorizing court must

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the approach used by the officers, and nothing in the record brings this conclusion into question.

specify the exact scope of the surveillance undertaken, enumerating the parties whose communications are to be overheard (if they are known), the place to be monitored, and the agency that will do the monitoring. See 18 U. S. C. § 2518 (4).

The plain effect of the detailed restrictions of § 2518 is to guarantee that wiretapping or bugging occurs only when there is a genuine need for it and only to the extent that it is needed.[9] Once this need has been demonstrated in accord with the requirements of § 2518, the courts have broad authority to "approv[e] interception of wire or oral communications," 18 U. S. C. §§ 2516 (1), (2), subject of course to constitutional limitations. See Part II, *supra*.[10] Nowhere in Title III is there any indication that the authority of courts under § 2518 is to be limited to approving those methods of interception that do not require covert entry for installation of the intercepting equipment.[11]

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[9] It is clear that Title III serves a substantial public interest. See n. 13, *infra*. Congress and this Court have recognized, however, that electronic surveillance can be a threat to the "cherished privacy of law-abiding citizens" unless it is subjected to the careful supervision prescribed by Title III. See *United States* v. *United States District Court*, 407 U. S. 297, 312 (1972).

[10] Congress explicitly confirmed the breadth of the power it had conferred on courts acting under Title III when it amended the Act in 1970. Pub. L. 91-358, Title II, § 211 (b), 84 Stat. 654. Section 2518 (4) now empowers a court authorizing electronic surveillance to "direct that a . . . landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception *unobtrusively* . . . ." (Emphasis added.) Thus, it appears that Congress anticipated that landlords and custodians may be enlisted to aid law enforcement officials covertly to enter and place the necessary equipment in private areas.

[11] The only limitation Title III places on the manner in which these court orders are to be executed is in its requirements that no order extend beyond 30 days, and that every order must include provisions that it is to be executed as soon as practicable and in a manner that will minimize the

The legislative history of Title III underscores Congress' understanding that courts would authorize electronic surveillance in situations where covert entry of private premises was necessary. Indeed, a close examination of that history reveals that Congress did not explicitly address the question of covert entries in the Act, only because it did not perceive surveillance requiring such entries to differ in any important way from that performed without entry. Testimony before subcommittees considering Title III and related bills indicated that covert entries were a necessary part of most electronic bugging operations. See, *e. g.*, Anti-Crime Program: Hearings on H. R. 5037, etc., before Subcommittee No. 5 of the House Committee on the Judiciary, 90th Cong., 1st Sess., 1031 (1967). Moreover, throughout the Senate Report on Title III indiscriminate reference is made to the types of surveillance this Court reviewed in *Berger* v. *New York*, 388 U. S. 41 (1967), and *Katz* v. *United States*, 389 U. S. 347 (1967). See, *e. g.*, S. Rep. No. 1097, *supra*, at 74–75, 97, 101–102, 105. Apparently Committee members did not find it significant that *Berger* involved a covert entry, whereas *Katz* did not. Compare *Berger* v. *New York*, *supra*, at 45, with *Katz* v. *United States*, *supra*, at 348.[12]

It is understandable, therefore, that by the time Title III

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interception of communications not within the purview of the order. See 18 U. S. C. § 2518 (5).

[12] Indeed, the nature of electronic surveillance involved in *Berger* v. *New York* was mentioned on the floor of the Senate, when Senator Long observed that under the New York law, police could "obtain judicial warrants authorizing them to hide bugs in the premises of criminal suspects." 114 Cong. Rec. 14708 (1968). To be sure, in his comments Senator Long did not explicitly suggest that Title III would authorize such covert entries. See *post*, at 272. His statement confirmed, however, what had been strongly indicated prior to the bill's consideration by the full Congress: Members of Congress simply saw no distinction between electronic surveillance which required covert entry and that which required covert tapping of one's telephone. The invasion of the privacy of conversation is the same in both situations.

was discussed on the floor of Congress, those Members who referred to covert entries indicated their understanding that such entries would necessarily be a part of bugging authorized under Title III. Thus, for example, in voicing his support for Title III Senator Tydings emphasized the difficulties attendant upon installing necessary equipment:

> "[S]urveillance is very difficult to use. Tape [*sic*] must be installed on telephones, and wires strung. *Bugs are difficult to install in many places since surreptitious entry is often impossible. Often, more than one entry is necessary to adjust equipment.*" 114 Cong. Rec. 12989 (1968) (emphasis added).

In the face of this record, one simply cannot assume that Congress, aware that most bugging requires covert entry, nonetheless wished to except surveillance requiring such entries from the broad authorization of Title III, and that it resolved to do so by remaining silent on the subject. On the contrary, the language and history of Title III convey quite a different explanation for Congress' failure to distinguish between surveillance that requires covert entry and that which does not: Those considering the surveillance legislation understood that, by authorizing electronic interception of oral communications in addition to wire communications, they were necessarily authorizing surreptitious entries.

Finally, Congress' purpose in enacting the statute would be largely thwarted if we were to accept petitioner's invitation to read into Title III a limitation on the courts' authority under § 2518. Congress permitted limited electronic surveillance under Title III because it concluded that both wiretapping and bugging were necessary to enable law enforcement authorities to combat successfully certain forms of crime.[13]

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[13] Title 18 U. S. C. § 2516 specifies that authorization for electronic surveillance may be sought only with respect to certain enumerated crimes. These include espionage, sabotage, treason, kidnaping, robbery, extortion, murder, various corrupt practices, and counterfeiting. According to the

Absent covert entry, however, almost all electronic bugging would be impossible.[14] See *United States* v. *Ford*, 414 F. Supp. 879, 882 (DC 1976), aff'd, 180 U. S. App. D. C. 1, 553 F. 2d 146 (1977); McNamara, The Problem of Surreptitious Entry

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Senate Report concerning Title III, "[e]ach offense has been chosen either because it is intrinsically serious or because it is characteristic of the operations of organized crime." S. Rep. No. 1097, 90th Cong., 2d Sess., 97 (1968). The need for use of electronic surveillance against organized crime had been thoroughly considered and documented, shortly before Congress began considering Title III, by a special organized-crime Task Force of a Presidential Commission charged with considering crime in the United States. The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Organized Crime 91–104 (1967); see *United States* v. *United States District Court*, 407 U. S., at 310 n. 9. A summary of the Task Force's conclusions appeared in the Commission's report, which was repeatedly referred to during consideration of Title III. See The President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 200–203 (1967). In Congress, proponents of Title III, after hearing numerous witnesses testify concerning the importance of electronic surveillance in fighting organized crime, recommended the bill to their colleagues as "[l]egislation meeting the constitutional standards set out in [Supreme Court] decisions, and granting law enforcement officers the authority to tap telephone wires and install electronic surveillance devices in the investigation of major crimes." S. Rep. No. 1097, *supra*, at 75; see *id.*, at 74. Indeed, the Senate Report on Title III unequivocally stated that "[t]he major purpose of title III is to combat organized crime." *Id.*, at 70. The rapid developments in technology available to the criminal underworld make it all the more imperative that the Government not "deny to itself the prudent and lawful employment of those very techniques which are employed against the Government and its law-abiding citizens." *United States* v. *United States District Court*, *supra*, at 312.

[14] Although he cites no authority, MR. JUSTICE STEVENS apparently believes that a practicable alternative to covert entry would be installation of bugging devices through subterfuge. See *post*, at 272. Nowhere in the legislative history of Title III is there any indication that Congress wished to limit its authorization to bugs installed through subterfuge. Moreover, it is difficult to perceive why one means of gaining entry would be less intrusive than another. See, *e. g.*, *United States* v. *Ford*, 414 F. Supp. 879 (DC 1976), aff'd, 180 U. S. App. D. C. 1, 553 F. 2d 146 (1977) (bomb-scare ruse).

to Effectuate Electronic Eavesdrops: How Do You Proceed After the Court Says "Yes"?, 15 Am. Crim. L. Rev. 1, 3 (1977). As recently as 1976, a congressional commission established to study and evaluate the effectiveness of Title III concluded that in most cases electronic surveillance cannot be performed without covert entry into the premises being monitored. See U. S. National Commission for Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance, Electronic Surveillance 15, 43, and n. 19, 86 (1976). The same conclusion was reached by the American Bar Association committee charged with formulating standards governing use of electronic surveillance. See ABA Project on Minimum Standards for Criminal Justice, Electronic Surveillance 65 n. 175, 149 (App. Draft 1971).[15]

In sum, we conclude that Congress clearly understood that it was conferring power upon the courts to authorize covert entries ancillary to their responsibility to review and approve surveillance applications under the statute. To read the statute otherwise would be to deny the "respect for the policy of Congress [that] must save us from imputing to it a self-defeating, if not disingenuous purpose." *Nardone* v. *United States*, 308 U. S. 338, 341 (1939).[16]

IV

Petitioner's final contention is that, if covert entries are to be authorized under Title III, the authorizing court must

[15] Those few available devices that intercept conversations from outside of a building in many cases are impractical, either because of cost, reliability, or the configuration of the area being monitored. See U. S. National Commission for Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance, Commission Studies 168–183 (1976); see, *e. g.*, *United States* v. *Ford*, 414 F. Supp., at 881.

[16] As we have concluded that Title III authorizes courts to approve covert entries to install electronic surveillance equipment, we do not consider whether such authority also is conferred by other federal enactments, such as Fed. Rule Crim. Proc. 41 or the All Writs Act, 28 U. S. C. § 1651.

explicitly set forth its approval of such entries before the fact. In this case, as is customary, the court's order constituted the sole written authorization of the surveillance of petitioner's office. As it did not state in terms that the surveillance was to include a covert entry, petitioner insists that the entry violated his Fourth Amendment privacy rights. Accord, *United States* v. *Ford*, 180 U. S. App. D. C., at 25, 553 F. 2d, at 170; *Application of United States*, 563 F. 2d 637, 644 (CA4 1977).[17]

The Fourth Amendment requires that search warrants be issued only "upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Finding these words to be "precise and clear," *Stanford* v. *Texas*, 379 U. S. 476, 481 (1965), this Court has interpreted them to require only three things. First, warrants must be issued by neutral, disinterested magistrates. See, *e. g.*, *Connally* v. *Georgia*, 429 U. S. 245, 250–251 (1977) (*per curiam*); *Shadwick* v. *Tampa*, 407 U. S. 345, 350 (1972); *Coolidge* v. *New Hampshire*, 403 U. S. 443, 459–460 (1971). Second, those seeking the warrant must demonstrate to the magistrate their probable cause to believe that "the evidence sought will aid in a particular apprehension or conviction" for a particular offense. *Warden* v. *Hayden*, 387 U. S. 294, 307 (1967). Finally, "warrants must particularly describe the 'things to be seized,'" as well as the place to be searched. *Stanford* v. *Texas*, *supra*, at 485.

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[17] There is no requirement in Title III that explicit authorization of covert entries be set forth in the court's order. The statutory requirement that the surveillance "should remain under the control and supervision of the authorizing court" 82 Stat. 211, § 801 (d), merely emphasizes that courts acting under 18 U. S. C. § 2518 should utilize their power under § 2518 (6) to require periodic progress reports after the installation of the wiretap or bug. If there is a requirement of explicit judicial authorization for covert entry, therefore, it must come from the Fourth Amendment alone.

In the present case, the April 5 court order authorizing the interception of oral communications occurring within petitioner's office was a warrant issued in full compliance with these traditional Fourth Amendment requirements. It was based upon a neutral magistrate's independent finding of probable cause to believe that petitioner had been and was committing specifically enumerated federal crimes, that petitioner's office was being used "in connection with the commission of [these] offenses," and that bugging the office would result in the interception of "oral communications concerning these offenses." App. 6a–7a. Moreover, the exact location and dimensions of petitioner's office were set forth, see n. 4, *supra*, and the extent of the search was restricted to the "[i]ntercept[ion of] oral communications of Larry Dalia and others as yet unknown, concerning the above-described offenses at the business office of Larry Dalia . . . ." App. 8a.[18]

Petitioner contends, nevertheless, that the April 5 order was insufficient under the Fourth Amendment for its failure to specify that it would be executed by means of a covert

[18] Because of the strict requirements of Title III, all of the indicia of a warrant necessarily are present whenever an order under Title III is issued. Accord, *United States* v. *Scafidi*, 564 F. 2d, at 644 (Gurfein, J., concurring). Indeed, it was Congress' express design to create under Title III a mechanism by which search warrants valid under the Fourth Amendment would be issued for electronic surveillance. See S. Rep. No. 1097, *supra* n. 13, at 105; Controlling Crime Through More Effective Law Enforcement: Hearings on S. 300, etc., before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 90th Cong., 1st Sess., 176, 570, 919 (1967); Hearings on H. R. 5037, etc., before Subcommittee No. 5 of the House Committee on the Judiciary, 90th Cong., 1st Sess., 917, 934 (1967). No less would be required for the court authorization of electronic surveillance under Title III to be constitutional, as electronic surveillance undeniably is a Fourth Amendment intrusion requiring a warrant. See, *e. g.*, *Katz* v. *United States*, 389 U. S. 347, 352–353, 356–357 (1967). And we have explicitly recognized the necessity of a warrant in cases of electronic surveillance. See *United States* v. *United States District Court*, 407 U. S., at 316–320.

entry of his office. Nothing in the language of the Constitution or in this Court's decisions interpreting that language suggests that, in addition to the three requirements discussed above, search warrants also must include a specification of the precise manner in which they are to be executed. On the contrary, it is generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by warrant [19]—subject of course to the general Fourth Amendment protection "against unreasonable searches and seizures."

Recognizing that the specificity required by the Fourth Amendment does not generally extend to the means by which warrants are executed, petitioner further argues that warrants for electronic surveillance are unique because often they impinge upon two different Fourth Amendment interests: The surveillance itself interferes only with the right to hold private conversations, whereas the entry subjects the suspect's property to possible damage and personal effects to unauthorized examination. This view of the Warrant Clause parses too finely the interests protected by the Fourth Amendment. Often in executing a warrant the police may find it necessary to interfere with privacy rights not explicitly considered by the judge who issued the warrant. For example, police executing an arrest warrant commonly find it necessary to enter

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[19] For example, courts have upheld the use of forceful breaking and entering where necessary to effect a warranted search, even though the warrant gave no indication that force had been contemplated. See, *e. g.*, *United States* v. *Gervato*, 474 F. 2d 40, 41 (CA3), cert. denied, 414 U. S. 864 (1973). To be sure, often it is impossible to anticipate when these actions will be necessary. See Note, Covert Entry in Electronic Surveillance: The Fourth Amendment Requirements, 47 Ford. L. Rev. 203, 214 (1978). Nothing in the decisions of this Court, however, indicates that officers requesting a warrant would be constitutionally required to set forth the anticipated means for execution even in those cases where they know beforehand that unannounced or forced entry likely will be necessary. See 2 W. LaFave, Search and Seizure 140 (1978).

the suspect's home in order to take him into custody, and they thereby impinge on both privacy and freedom of movement. See, *e. g., United States* v. *Cravero,* 545 F. 2d 406, 421 (CA5 1976) (on petition for rehearing). Similarly, officers executing search warrants on occasion must damage property in order to perform their duty. See, *e. g., United States* v. *Brown,* 556 F. 2d 304, 305 (CA5 1977); *United States* v. *Gervato,* 474 F. 2d 40, 41 (CA3), cert. denied, 414 U. S. 864 (1973).

It would extend the Warrant Clause to the extreme to require that, whenever it is reasonably likely that Fourth Amendment rights may be affected in more than one way, the court must set forth precisely the procedures to be followed by the executing officers. Such an interpretation is unnecessary, as we have held—and the Government concedes—that the manner in which a warrant is executed is subject to later judicial review as to its reasonableness. See *Zurcher* v. *Stanford Daily,* 436 U. S. 547, 559–560 (1978).[20] More important, we would promote empty formalism were we to require magistrates to make explicit what unquestionably is implicit in bugging authorizations: [21] that a covert entry, with its attendant interference with Fourth Amendment interests, may be necessary for the installation of the surveillance equipment. See *United States* v. *London,* 424 F. Supp. 556, 560 (Md. 1976). We conclude, therefore, that the Fourth Amendment does not require that a Title III electronic surveillance order include a

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[20] The District Court found that covert entry in the present case was reasonable. The officers entered petitioner's office only twice: once to install the bug and once to remove it. There is no indication that their intrusion went beyond what was necessary to install and remove the equipment. See n. 8, *supra.*

[21] In the present case, the District Court specifically noted that its order implicitly had authorized covert entry. See *supra,* at 246. Thus, contrary to the suggestion of the dissent, see *post,* at 270 n. 20, there is no question in this case "of the *Executive's* authority to break and enter at will *without* any judicial authorization."

specific authorization to enter covertly the premises described in the order.[22]

The judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART joins except as to Part I, concurring in part and dissenting in part.

I concur in Parts I and II of the Court's opinion.

I

I dissent from Part III for the reasons stated in the dissenting opinion of MR. JUSTICE STEVENS which I join.

II

I also dissent from Part IV. In my view, even reading Title III to authorize covert entries, the Justice Department's present practice of securing specific authorization for covert entries is not only preferable, see *ante*, this page n. 22, but also constitutionally required.

Breaking and entering into private premises for the purpose of planting a bug cannot be characterized as a mere mode of warrant execution to be left to the discretion of the executing officer. See *ante*, at 257. The practice entails an invasion

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[22] Although explicit authorization of the entry is not constitutionally required, we do agree with the Court of Appeals that the "preferable approach" would be for Government agents in the future to make explicit to the authorizing court their expectation that some form of surreptitious entry will be required to carry out the surveillance. Indeed, the Solicitor General has informed us that the Department of Justice has adopted a policy requiring its officers "[to] include [in applications for Title III orders] a request that the order providing for the interception specifically authorize surreptitious entry for the purpose of installing and removing any electronic interception devices to be utilized in accomplishing the oral interception." See Brief for United States 56.

of privacy of constitutional significance distinct from that which attends nontrespassory surveillance; indeed, it is tantamount to an independent search and seizure. First, rooms may be bugged without the need for surreptitious entry and physical invasion of private premises. See *Lopez* v. *United States*, 373 U. S. 427, 467–468 (1963) (BRENNAN, J., dissenting). Second, covert entry, a practice condemned long before we condemned unwarranted eavesdropping, see *Silverman* v. *United States*, 365 U. S. 505 (1961), breaches physical as well as conversational privacy. The home or office itself, that "inviolate place which is a man's castle," *id.*, at 512 n. 4, is invaded. Third, the practice is particularly intrusive and susceptible to abuse since it leaves naked to the hands and eyes of government agents items beyond the reach of simple eavesdropping.

Because of these additional intrusions attendant to covert entries, the Constitution requires that government agents who wish to break into private premises first secure specific judicial authorization for the surreptitious entry. Authority for the physical invasion cannot be derived from a Title III order authorizing only electronic surveillance.

"[T]he Fourth Amendment confines an officer executing a search warrant strictly within the bounds set by the warrant," *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, 394 n. 7 (1971), in order to assure that those "searches deemed necessary [remain] as limited as possible." *Coolidge* v. *New Hampshire*, 403 U. S. 443, 467 (1971). See *Stanford* v. *Texas*, 379 U. S. 476, 485 (1965); *Marron* v. *United States*, 275 U. S. 192, 196 (1927).* As a consequence, a warrant that describes

*The Court's reliance upon *United States* v. *Cravero*, 545 F. 2d 406, 421 (CA5 1976) (on petition for rehearing), for the opposite proposition is misplaced. In *Cravero*, police could not have anticipated the need to arrest the suspect at his home at the time the arrest warrant was issued. It would have been unreasonable, therefore, to require the warrant to specify a home arrest. Here, by contrast, the covert entry was easily foreseeable. There is no reason why the federal agents who secured the

only the seizure of conversations cannot be read expansively to authorize constitutionally distinct physical invasions of privacy at the discretion of the executing officer. Rather, the Constitution demands that the necessity for home invasion be decided "by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson* v. *United States*, 333 U. S. 10, 14 (1948).

I cannot agree that adherence to this principle would amount to "specification of the precise manner" in which Title III orders are executed. See *ante*, at 257. The warrant could, consistent with the command of the Fourth Amendment, leave the details of how best to proceed with the covert entry to the discretion of the executing officers. The warrant need only state, as under the present Justice Department practice, that "surreptitious entry for the purpose of installing and removing any electronic interception devices [is] to be utilized in accomplishing the oral interception." *Ante*, at 259 n. 22.

Nor can I agree that adherence to the strictures of the Warrant and Particularity Clauses of the Fourth Amendment would amount to "empty formalism." See *ante*, at 258. Since premises may be bugged through means less drastic than home invasion, requiring police to secure prior approval for covert entries may well prevent unnecessary and improper intrusions. In any event, that the present case may not appear particularly abusive cannot justify the Court's crabbed interpretation of the Fourth Amendment. Mr. Justice Brad-

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warrant could not have advised the judge who issued the warrant that they contemplated covert entry. Indeed, the current Justice Department practice of securing specific prior authorization for covert entries demonstrates the practicability of a constitutional prior-authorization requirement.

United States v. *Gervato*, 474 F. 2d 40, 41 (CA3 1973), is distinguishable for the same reason and also because *Gervato* involved a mere mode of warrant execution (forcible entry) rather than an invasion of two separate expectations of privacy.

ley's admonition almost a century ago has even greater cogency in today's world of ever more intrusive governmental invasions of privacy:

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." *Boyd* v. *United States*, 116 U. S. 616, 635 (1886).

MR. JUSTICE STEVENS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

At midnight on the night of April 5–6, 1973, three persons pried open a window to petitioner's business office and secretly entered the premises. During the next three hours they moved freely about the building, eventually implanting a listening device in the ceiling. Several weeks later, they again broke into the office at night and removed the device.

The perpetrators of these break-ins were agents of the Federal Bureau of Investigation. Their office, however, carries with it no general warrant to trespass on private property. Without legislative or judicial sanction, the conduct of these agents was unquestionably "unreasonable" and therefore prohibited by the Fourth Amendment.[1] Moreover, that conduct

[1] See *United States* v. *United States District Court*, 407 U. S. 297. The Fourth Amendment provides:

"The right of the people to be secure in their persons, houses, papers,

violated the Criminal Code of the State of New Jersey unless it was duly authorized.[2]

The only consideration that arguably might legitimate these "otherwise tortious and possibly criminal" invasions of petitioner's private property,[3] is the fact that a federal judge had entered an order authorizing the agents to use electronic equipment to intercept oral communications at petitioner's office. The order, however, did not describe the kind of equipment to be used and made no reference to an entry, covert or otherwise, into private property. Nor does any statute expressly permit such activity or even authorize a federal judge to enter orders granting federal agents a license to commit criminal trespass. The initial question this case raises, therefore, is whether this kind of power should be read into a statute that does not expressly grant it.

In my opinion, there are three reasons, each sufficient by itself, for refusing to do so. First, until Congress has stated otherwise, our duty to protect the rights of the individual should hold sway over the interest in more effective law enforcement. Second, the structural detail of this statute precludes a reading that converts silence into thunder. Third, the legislative history affirmatively demonstrates that Congress never contemplated the situation now before the Court.

I

"Congress, like this Court, has an obligation to obey the mandate of the Fourth Amendment." *Marshall* v. *Barlow's, Inc.*, 436 U. S. 307, 334 (STEVENS, J., dissenting). But Congress is better equipped than the Judiciary to make the empiri-

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and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[2] N. J. Stat. Ann. §§ 2A:94–1, 2A:94–3 (West 1969).

[3] T. Taylor, Two Studies in Constitutional Interpretation 110 (1969).

cal judgment that a previously unauthorized investigative technique represents a "reasonable" accommodation between the privacy interests protected by the Fourth Amendment and effective law enforcement.[4] Throughout our history, therefore, it has been Congress that has taken the lead in granting new authority to invade the citizen's privacy.[5] It is appropriate to accord special deference to Congress whenever it has expressly balanced the need for a new investigatory technique against the undesirable consequences of any intrusion on constitutionally protected interests in privacy. See *id.*, at 334–339.

But no comparable deference should be given federal intrusions on privacy that are not expressly authorized by Congress.[6] In my view, a proper respect for Congress' important

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[4] Cf. *G. M. Leasing Corp.* v. *United States*, 429 U. S. 338, 353; *United States* v. *Biswell*, 406 U. S. 311; *Colonnade Catering Corp.* v. *United States*, 397 U. S. 72, 76.

[5] "Beginning with the Act of July 31, 1789, 1 Stat. 29, 43, and concluding with the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 197, 219, 238, Congress has enacted a series of over 35 different statutes granting federal judges the power to issue search warrants of one form or another. These statutes have one characteristic in common: they are specific in their grants of authority and in their inclusion of limitations on either the places to be searched, the objects of the search, or the requirements for the issuance of a warrant." *United States* v. *New York Telephone Co.*, 434 U. S. 159, 179–180 (STEVENS, J., dissenting in part) (footnote omitted).

Mr. Justice Frankfurter gathered the pre-1945 statutes in his dissenting opinion in *Davis* v. *United States*, 328 U. S. 582, 616–623. He commented that "[w]hat is significant about this legislation is the recognition by Congress of the necessity for specific Congressional authorization even for the search of vessels and other moving vehicles and the seizures of goods technically contraband." *Id.*, at 616, n.

[6] I realize that since *Mapp* v. *Ohio*, 367 U. S. 643, the Court has applied the same Fourth Amendment principles to state and federal law enforcement officers alike. Nonetheless, I purposely limit my discussion here to the federal context. For purposes of discussing the necessity of statutory authority, it seems useful to me to treat the Fourth Amendment concept

role in this area, as well as our tradition of interpreting statutes to avoid constitutional issues,[7] compels this conclusion.

The Court does not share this view. For this is the third time in as many years that it has condoned a serious intrusion on privacy that was not explicitly authorized by statute and that admittedly raised a substantial constitutional question. In *United States* v. *Ramsey*, 431 U. S. 606, the Court upheld an Executive regulation authorizing postal inspectors to open private letters without probable cause to believe they contained contraband.[8] In *United States* v. *New York Telephone Co.*, 434 U. S. 159, the Court upheld orders authorizing the surreptitious pen-register surveillance of an individual and directing a private company to lend its assistance in that endeavor. Again, no explicit statutory authority existed for either order, despite Congress' otherwise comprehensive treatment of wire surveillance in Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Title III).[9]

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of reasonableness as flexible enough to recognize differences between state and federal courts and police forces. Thus, because the power of the Federal Government to combat crime, like the jurisdiction of its courts, is more limited than the comparable power and jurisdiction inhering in the States, it is logical in the federal context to assume that governmental authority is lacking unless expressly mandated by legislation. See, *e. g.*, *Palmore* v. *United States*, 411 U. S. 389, 396; *Cheng Fan Kwok* v. *INS*, 392 U. S. 206; *United States* v. *Five Gambling Devices*, 346 U. S. 441.

[7] See *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U. S. 10; *Machinists* v. *Street*, 367 U. S. 740; *Hannah* v. *Larche*, 363 U. S. 420, 430; *Murray* v. *The Charming Betsy*, 2 Cranch 64.

[8] It found authority for those searches in the Postal Service's recent reinterpretation of an awkwardly drawn 1866 statute that authorized certain border searches of "vessels" but that could not reasonably be read to authorize either the mail openings themselves or the regulation allowing them. Moreover, its adoption of that interpretation left it no choice but to resolve a troublesome constitutional question without any considered guidance from Congress. See 431 U. S., at 625–632 (STEVENS, J., dissenting).

[9] See 434 U. S., at 178–190 (STEVENS, J., dissenting in part).

Today the Court has gone even further in finding an implicit grant of Executive power in Title III. That Title "does not refer explicitly to covert entry" of any kind, much less to entries that are tortious or criminal. *Ante*, at 249. Nevertheless, the Court holds that Congress, without having said so explicitly, has authorized the agents of a national police force in carrying out a surveillance order to break into private premises [10] in violation of state law. Moreover, the Court finds in the silent statute an open-ended authorization to effect such illegal entries without an explicit judicial determination that there is probable cause to believe they are necessary or even appropriate. In my judgment, it is most unrealistic to assume that Congress granted such broad and controversial authority to the Executive without making its intention to do so unmistakably plain. This is the paradigm case in which "the exact words of the statute provide the surest guide to determining Congress' intent." [11] I would not enlarge the coverage of the statute beyond its plain meaning.

II

The Court's conclusion that the statute implicitly authorizes breaking and entering is especially anomalous because the statutory scheme in all other respects is exhaustive and ex-

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[10] Although this case involves an office, the invasion of a home would raise precisely the same statutory issue.

[11] "Congress drafted [Title III] with exacting precision. As its principal sponsor, Senator McClellan, put it:

" '[A] bill as controversial as this . . . requires close attention to the dotting of every "i" and the crossing of every "t" . . . .' [114 Cong. Rec. 14751 (1968).]

"Under these circumstances, the exact words of the statute provide the surest guide to determining Congress' intent, and we would do well to confine ourselves to that area." *United States* v. *Donovan*, 429 U. S. 413, 441 (BURGER, C. J., concurring in part and dissenting in part).

plicit.[12] "It simply does not make sense" [13] to conclude that Congress—having minutely detailed (1) the process that "[t]he Attorney General, or any Assistant Attorney General specially designated by the Attorney General" must follow in authorizing federal police officers to seek an electronic surveillance order,[14] (2) the limited number of suspected offenses that will justify such an order,[15] (3) the showing that must be made to "a Federal judge" before he issues the order,[16] (4) the

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[12] See *ante*, at 249–250; nn. 13–18, *infra*, and text accompanying.

[13] As Judge Merritt, writing for the Sixth Circuit, cogently observed:

"It simply does not make sense to imply Congressional authority for official break-ins when not a single line or word of the statute even mentions the possibility, much less limits or defines the scope of the power or describes the circumstances under which such conduct, normally unlawful, may take place. As the dissents of Holmes and Brandeis in *Olmstead* [v. *United States*, 277 U. S. 438] suggest, this is a serious, if not a 'dirty,' business; and we do not believe we should imply the power to break in under the statute, as the government argues, when Congress has not confronted and debated the issue and expressed such an intention clearly.

. . . . . .

"In some circumstances, the installation of an electronic bug may not be possible without a forcible breaking and entering of the suspect's premises, but that does not imply that the power to break and enter is subsumed in the warrant to seize the words. The breaking and entering aggravates the search, and it intrudes upon property and privacy interests not weighed in the statutory scheme, interests which have independent social value unrelated to confidential speech. We are not inclined to give the government the right by implication to intrude upon these interests by conducting official break-ins, especially when the purpose is secretly to monitor and record private conversations, a dangerous power otherwise carefully limited and defined by statute." *United States* v. *Finazzo*, 583 F. 2d 837, 841–842 (CA6 1978). See also *United States* v. *Santora*, 583 F. 2d 453, 456–466 (CA9 1978).

[14] 18 U. S. C. § 2516 (1).

[15] 18 U. S. C. §§ 2516 (1)(a)–(g).

[16] "Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the

standard the judge must apply in approving, and the format he must follow in preparing, the order,[17] (5) the time frame of execution and the manner of execution with respect to

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applicant's authority to make such application. Each application shall include the following information:

"(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

"(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

"(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

"(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

"(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

"(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results." 18 U. S. C. § 2518 (1).

[17] "(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

"(a) there is probable cause for belief that an individual is committing,

minimizing the interception of communications not likely to involve criminal activity,[18] and even having more recently specified (6) certain "unobtrusive" means by which those

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has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

"(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

"(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

"(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

"(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

"(a) the identity of the person, if known, whose communications are to be intercepted;

"(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

"(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

"(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

"(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained. . . ." 18 U. S. C. §§ 2518 (3), (4).

[18] "No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not other-

orders might be carried out without the awareness of the suspect [19]—was content to leave national police officers with unbounded authority to carry out the resulting orders in any unspecified and obtrusive fashion they chose "subject of course to constitutional limitations." *Ante*, at 250.[20]

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wise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days." 18 U. S. C. § 2518 (5).

The statute also details procedures for the storage and protective custody of the resulting tapes, 18 U. S. C. §§ 2518 (8) (a)–(c), for authorized disclosures and uses of the tapes both in and out of court, 18 U. S. C. §§ 2517, 2518 (9), and for after-the-fact notice to persons whose conversations were overheard. 18 U. S. C. § 2518 (8) (d).

[19] The following provision was added to Title III in 1970:

"An order authorizing the interception of a wire or oral communication shall, upon request of the applicant, direct that a communication common carrier, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier, landlord, custodian, or person is according the person whose communications are to be intercepted. Any communication common carrier, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefor by the applicant at the prevailing rates." 18 U. S. C. § 2518 (4).

[20] The Court analyzes this problem as simply one of *Judicial* authority under the statute. *Ante*, at 250, and n. 10. Even if I could agree that Title III afforded judges "broad" and unconfined authority with respect to break-ins, I would still be left with the problem, never mentioned by the Court, of the *Executive's* authority to break and enter at will *without* any judicial authorization.

Indeed, I am not at all certain that the Court puts any confines on either Judicial or Executive authority in this area, despite the lip service it pays to "constitutional limitations." For, having stated that "breaking and entering" in execution of a search warrant is constitutionally permissible "where such entry is the *only* means by which the warrant effectively may be executed," *ante*, at 247 (emphasis added), the Court then equates a surveillance order with a search warrant, but see Taylor, *supra* n. 3, at 84–85, and allows a break-in under the former upon a showing merely that the break-in was "the safest and most successful," rather than the "only," method of installing the device. 426 F. Supp. 862, 866.

In my view, it is the opposite conclusion that is true to the statutory structure. For "one simply cannot assume that Congress," see *ante*, at 252, wished to erect various procedural barriers against poor judgment on the part of the Attorney General and his subordinates in seeking, and on the part of federal district judges in issuing, eavesdropping orders only to commit their execution, even through illegal means, entirely to "the judgment and moderation of officers whose own interests and records are often at stake in the search." *Brinegar* v. *United States*, 338 U. S. 160, 182 (Jackson, J., dissenting). The detailed timing and minimization restrictions on the executing officer, see n. 18, *supra*, as well as the 1970 amendment to Title III concerning "unobtrusive" execution, see n. 19, *supra*, lead inescapably to the conclusion that Congress withheld authority to trespass on private property except through the limited means expressly dealt with in the statute.[21]

III

Only one relevant conclusion can be drawn from a review of the entire legislative history of Title III. The legislators never even considered the possibility that they were passing a statute that would authorize federal agents to break into private premises without any finding of necessity by a neutral and detached magistrate.

A

The meager legislative remarks that are said to demonstrate that Title III's supporters implicitly endorsed breaking and

[21] A Congress that was careful to limit the temporal extent of electronic surveillance and the opportunity for it to infringe on protected (*i. e.*, noncriminal) conversations, and one so quick to amend the statute to provide for "unobtrusive" entry through the aid of private persons (*i. e.*, "custodians" and "landlords") who already have a degree of access to the property, surely cannot have condoned unlimited and unauthorized breaking and entering by police officers with the aid of nothing but a burglar's tools.

entering in order to install listening devices actually provide no support for that conclusion.

The reference to "judicial warrants authorizing [police] to hide bugs in the premises of criminal suspects," see *ante*, at 251 n. 12, was a comment by an *opponent* of the bill on investigative techniques that he believed this Court had ruled *illegal* in *Berger* v. *New York*, 388 U. S. 41.[22] Since neither he, nor any supporter of the bill, suggested that those techniques would be authorized by Title III, his comment is hardly indicative of a legislative endorsement of such practices. Moreover, there is a marked difference between the judicially warranted "hid[ing of] bugs in the premises of criminal suspects" and a forcible entry that has not been expressly authorized by any judge. The difference between subterfuge and forcible trespass should not be ignored.

That difference explains why the Court's reliance on two statements by proponents of Title III that emphasize the technological limitations on "bugs" and "taps" is misplaced. The proponents believed these limitations would discourage the frequent use and abuse of electronic surveillance. Thus, in answer to repeated charges that passage of Title III would recreate Hitler's Germany or anticipate Orwell's "1984," Senator Tydings, in a passage partially quoted by the Court, *ante*, at 252, argued:

> "Contrary to what we have heard, electronic surveillance is not a lazy way to conduct an investigation. *It*

[22] In full, the paragraph excerpted by the Court is as follows:

"In Berger against the State of New York, decided on June 12, 1967, the majority of the Court, speaking through Mr. Justice Clark, threw out the New York State court-approved eavesdropping statute, declaring it to be unconstitutional. The New York statute permitted the police to obtain judicial warrants authorizing them to hide bugs in the premises of criminal suspects. The Court's majority opinion outlawed this bugging statute because, it said, the procedures did not contain specific safeguards against violations of the fourth amendment, which limited police searches." 114 Cong. Rec. 14708 (1968) (Sen. Long of Missouri).

will not be used wholesale as a substitute for physical investigation.

. . . . . .

"The reason[s] for such sparing use are simple. First, electronic surveillance is really useful only in conspiratorial activities. . . .

"Second, surveillance is very difficult to use. Tape must be installed on telephones and wires strung. *Bugs are difficult to install in many places since surreptitious entry is often impossible.* Often, more than one entry is necessary to adjust equipment. . . .

"Third, monitoring this equipment requires the expenditure of a great amount of law enforcement's time . . . ." 114 Cong. Rec. 12988–12989 (1968) (emphasis added).[23]

Read in context, this and like commentary are inconsistent with, rather than an endorsement of, unauthorized break-ins. For although it is of course true that surreptitious entry is often "impossible" when it must be accomplished without violating the law, surreptitious entry is by no means impossible (indeed, it is hardly "difficult") if it may be effected by whatever means the police—unhampered by the provisions of the criminal law—can bring to their disposal. Despite the Court's understanding of it, I read Senator Tydings' remark as only one of many expressions by Title III's supporters of their belief that authorized electronic surveillance would be "carefully circumscribed," *id.*, at 13203 (Sen. Scott) and "rigidly controlled," *id.*, at 14715 (Sen. Tydings), not only by technology but also by "strict court supervision," *id.*, at 13200 (Sen. Scott), the "strictest guidelines," *id.*, at 16076

[23] See also Anti-Crime Programs: Hearings on H. R. 5037, etc., before Subcommittee No. 5 of the House Committee on the Judiciary, 90th Cong., 1st Sess., 1031 (1967), cited *ante*, at 251.

(Rep. Harsha), and "an elaborate system of checks and safeguards." *Id.*, at 13204 (Sen. Scott).[24]

Even the opponents of Title III, in parading before Congress the various invasions of privacy that they felt would accompany the passage of the statute, never once referred to breaking and entering private property. *E. g., id.*, at 14710 (Sen. Cooper); *id.*, at 14732 (Sen. Yarborough); *id.*, at 16066 (Rep. Celler). That they omitted such references while decrying far less aggravated invasions is strong evidence that they, at least, never thought about the issue that this case raises.[25] And since the sponsors of the legislation expressly stated that they had specified "every possible constitutional safeguard for the rights of individual privacy," *id.*, at

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[24] "[Title III] sets forth in the most elaborate and precise detail the safeguards surrounding the application to a court of competent jurisdiction for authority to make a wiretap. I am satisfied that it is fully designed to guard against any unwarranted invasion of the precious right of privacy." 114 Cong. Rec. 16276 (1968) (Rep. MacGregor). See also *id.*, at 14763 (Sen. Percy); *id.*, at 16296 (Rep. Boland); S. Rep. No. 1097, 90th Cong., 2d Sess., 66 (1968).

On at least two occasions the Court has commented on the circumspection with which Title III was drafted:

"[Title III] sets forth the detailed and particularized application necessary to obtain such an order as well as the *carefully circumscribed conditions for its use*. The Act represents a comprehensive attempt by Congress to promote more effective control of crime while protecting the privacy of individual thought and expression." *United States* v. *United States District Court*, 407 U. S., at 302 (emphasis added). See also *Gelbard* v. *United States*, 408 U. S. 41, 48. See also n. 8, *supra*.

[25] Had Congress expressly considered the issue, I am confident that it would not have granted the Executive the broad authority to break and enter that is conferred by the Court in today's decision. Illustrative of its probable reaction to such investigative techniques are the responses of some Members to the officially sanctioned break-in committed against the office of Daniel Ellsberg's psychiatrist, and to the possibility of official participation in the Watergate break-in. *E. g.*, 119 Cong. Rec. 14607–14608 (1973) (Sen. Edwards); *id.*, at 15332 (Rep. Sarasin).

14469 (Sen. McClellan),[26] their omission of any significant reference to these aggravated intrusions surely demonstrates that they did not consider this issue either.

In sum, as far as my research reveals, during the debates on Title III neither the proponents nor the opponents of the bill directly or indirectly expressed the view that the statute would authorize uninvited forcible trespasses by police officers as a means of implanting a listening device.

B

Because the drafters of Title III made "indiscriminate reference . . . to the types of surveillance this Court reviewed" in prior cases, *ante*, at 251, the Court draws the conclusion that Congress meant to authorize all "types of surveillance" discussed in those cases. The premise does not support the conclusion.

Many of those cases, including the two specifically cited by the Court,[27] held that the police conduct involved was unlawful. Rather than endorsing all of the techniques discussed in those cases, Congress was quite clearly trying to *avoid* the incidents of unconstitutionality those cases had

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[26] The dimensions of the constitutional protection of privacy were certainly not underestimated by the supporters of Title III. Senator Lausche, for example, had this to say about the intent of the Framers of the Fourth Amendment:

"[T]hey also knew that the innocent individual would be protected in his home; that no one shall enter. Even though it is a hovel, to him it is a palace. So they wrote into the Constitution, regardless of how poor one's home may be, that it shall not be entered by the government without the law-enforcement official having first obtained a warrant for search and seizure issued on the basis of evidence establishing probable cause." 114 Cong. Rec. 14729 (1968).

[27] *Katz* v. *United States*, 389 U. S. 347; *Berger* v. *New York*, 388 U. S. 41. See also *Silverman* v. *United States*, 365 U. S. 505; *Irvine* v. *California*, 347 U. S. 128.

identified.[28] Moreover, in drafting Title III, the Senate Judiciary Committee did more than merely isolate and exclude from the bill the illegal elements of the police activity involved in those cases. Thus, the Chairman of the Committee, in answer to a colleague's question whether Title III was drafted in conformity with the Fourth Amendment, stated:

> "Completely so, let me say to my friend. Completely so, and it is *even more restrictive.* We have gone to every length which is proper, we think, to protect people's privacy." 114 Cong. Rec. 14470 (1968).

It is of greater importance, however, that although Congress was concerned with the "types of *surveillance*" involved in our prior cases, none of the congressional references to those cases discussed the type of *entry* made to effectuate the surveillance. Not a word in any of those pre-1968 opinions, save one, described an illegal entry or even implied that such an entry had occurred. Those opinions instead described situations in which a listening device had been surreptitiously placed: against an office wall in order to hear conversations in the next office, *Goldman* v. *United States,* 316 U. S. 129; on the person of a federal agent who recorded a conversation in the defendant's laundry, *On Lee* v. *United States,* 343 U. S. 747; in a cabaret, *Lopez* v. *United States,* 373 U. S. 427; in a law office, *Osborn* v. *United States,* 385 U. S. 323; against a spike inserted under a party wall, *Silverman* v. *United States,* 365 U. S. 505; on the outside of a public telephone booth, *Katz* v. *United States,* 389 U. S. 347; and inside a private office, *Berger* v. *New York,* 388 U. S. 41. It is, of course, true that the conduct in each cited case was surreptitious, but there is a vast difference between detective work that is merely clandestine and work that involves breaking and entering into private property. Before the decisions in *Katz* and *Berger,* the former technique was considered to be lawful, warrant or

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[28] See S. Rep. No. 1097, *supra,* at 66, 75, 101.

no warrant,[29] whereas the latter was considered unlawful.[30] The fact that Congress was prepared to enact a statute authorizing practices previously thought to be lawful surely does not justify the conclusion that it was equally prepared to authorize conduct that had always been made unlawful by the criminal laws of the various States.

Irvine v. *California*, 347 U. S. 128, was the only pre-1968 case in which this Court had actually confronted the implantation of an electronic listening device by way of a "trespass, and probably a burglary, for which any unofficial person should be, and probably would be, severely punished." *Id.*, at 132.[31] The plurality of four, speaking through Mr. Justice Jackson, had this to say about the police conduct in that case:

> "That officers of the law would break and enter a home, secrete such a device even in a bedroom, and listen to the conversations of the occupants for over a month would be incredible if it were not admitted. Few police measures have come to our attention that more flagrantly, deliberately, and persistently violated the funda-

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[29] *E. g.*, *On Lee* v. *United States*, 343 U. S. 747; *Goldman* v. *United States*, 316 U. S. 129; *Olmstead* v. *United States*, 277 U. S. 438.

[30] *E. g.*, *Silverman* v. *United States*, *supra*; *Irvine* v. *California*, *supra*.

[31] Mr. Justice Jackson described the entry as follows:

"On December 1, 1951, while Irvine and his wife were absent from their home, an officer arranged to have a locksmith go there and make a door key. Two days later, again in the absence of occupants, officers and a technician made entry into the home by the use of this key and installed a concealed microphone in the hall. A hole was bored in the roof of the house and wires were strung to transmit to a neighboring garage whatever sounds the microphone might pick up. Officers were posted in the garage to listen. On December 8, police again made surreptitious entry and moved the microphone, this time hiding it in the bedroom. Twenty days later, they again entered and placed the microphone in a closet, where the device remained until its purpose of enabling the officers to overhear incriminating statements was accomplished." 347 U. S., at 130–131.

mental principle declared by the Fourth Amendment . . . ." *Ibid.*

No Member of the Court disagreed with this assessment, although a majority refused to overturn the conviction because the exclusionary rule did not then apply to the States. While it is true, as the Court points out, *ante*, at 247, that four Members of the *Irvine* Court adverted to the lack of a "search warrant or other process" to support the entry, 347 U. S., at 132 (while the other three Members who discussed the issue found the police activity "offensive" and "revolting" without relying on the lack of a warrant [32]), it is also true that no Justice condoned a break-in absent some court order explicitly contemplating physical entry on the premises. Under any reading of the case, it cannot be taken as condoning official trespass and burglary absent specific authorization.

More importantly, the fact that Congress cited *Irvine*, without comment or explanation, when it was considering Title III cannot fairly be interpreted as an endorsement of the questionable police behavior that had been condemned so thunderously by Mr. Justice Jackson 14 years earlier. My respect for the lawmaking process forecloses the inference that Congress authorized burglarious conduct by such stealthy legislative history.

IV

Because it is not supported by either the text of the statute or the scraps of relevant legislative history,[33] I fear that the

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[32] *Id.*, at 145 (Frankfurter, J., dissenting, joined by Burton, J.); *id.*, at 150 (Douglas, J., dissenting).

[33] The Court argues that Congress' goals in enacting the statute would be frustrated if Title III were not read to include the authority exercised by the Government in this case. *Ante*, at 252–254. Of course, if Congress intended to sanction "even the most reprehensible means for securing a conviction," *Irvine*, 347 U. S., at 146 (Frankfurter, J., dissenting), then withholding some of those means would indeed frustrate the legislative purpose. But there is no reason to impute such an intent to Congress or to ignore its conscientious attention to the importance of safeguarding the

Court's holding may reflect an unarticulated presumption that national police officers have the power to carry out a surveillance order by whatever means may be necessary unless explicitly prohibited by the statute or by the Constitution.

But surely the presumption should run the other way. Congressional silence should not be construed to authorize the Executive to violate state criminal laws or to encroach upon constitutionally protected privacy interests. Before confronting the serious constitutional issues raised by the Court's reading of Title III,[34] we should insist upon an unambiguous statement by Congress that this sort of police conduct may be authorized by a court and that a specific showing of necessity, or at least probable cause, must precede such an authorization. Without a legislative mandate that is both explicit and specific, I would presume that this flagrant invasion of the citizen's privacy is prohibited. Cf. *United States* v. *New York Telephone Co.*, 434 U. S., at 178–179 (STEVENS, J., dissenting

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rights of individual privacy. See 114 Cong. Rec. 14469–14470 (1968) (Sen. McClellan); see *supra*, at 272–273, 276.

Congress quite clearly expected exterior *wiretaps* to provide the most effective means of electronic surveillance authorized by Title III. The unavailability of certain interior *"bugs"—i. e.*, those implanted by means of forcible trespass—can hardly be seen as frustrating the entire law enforcement scheme. *E. g.*, S. Rep. No. 1097, supra n. 24, at 72; 114 Cong. Rec. 12988 (1968) (Sen. Tydings); *id.*, at 13206 (Sen. Scott); *id.*, at 14481 (Sen. McClellan); *id.*, at 14714 (Sen. Murphy).

Congress' prediction proved correct:

"Telephone taps apparently account for most instances of electronic surveillance, and this can be accomplished in most circumstances by placing a tap on the line outside the premises of the suspect. According to the final report of the National Commission for Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance, only 26 out of some 1,220 electronic surveillance orders executed between 1968 and 1973 involved a trespassory intrusion. *National Wiretap Commission, Electronic Surveillance* 15 (1967) . . . ." *United States* v. *Finazzo*, 583 F. 2d, at 841 n. 13.

[34] Compare opinion of the Court, *ante*, at 246–248, 254–259, with opinion of MR. JUSTICE BRENNAN, *ante*, at 259–262.

in part); *United States* v. *Ramsey*, 431 U. S., at 632 (STEVENS, J., dissenting).[35]

I respectfully dissent.

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[35] In addition to Title III, the Government claims authority for the break-ins under the federal "no-knock" statute, 18 U. S. C. § 3109, and under Fed. Rule Crim. Proc. 41. Because I believe that Title III has preempted the field of electronic surveillance, it is conclusive for me that it nowhere authorizes the entries involved in this case as a means of executing an eavesdropping order. Even if Congress had never enacted Title III, however, I would nonetheless conclude that these other asserted justifications for official breaking and entering are unavailing in this case. Both provisions refer to "warrants" issued by a magistrate with the awareness that their execution would probably require the police to find some otherwise illegal means of entering the premises. No such awareness was evidenced by the District Court when it authorized electronic surveillance in this case. See generally *United States* v. *Finazzo*, *supra*, at 845–848.

CHRYSLER CORP. *v.* BROWN, SECRETARY OF DEFENSE, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 77-922. Argued November 8, 1978—Decided April 18, 1979

Petitioner, as a party to numerous Government contracts, was required to comply with Executive Orders 11246 and 11375, which charge the Secretary of Labor with ensuring that corporations that benefit from Government contracts provide equal employment opportunity regardless of race or sex. Regulations promulgated by the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) require Government contractors to furnish reports about their affirmative-action programs and the general composition of their work forces, and provide that notwithstanding exemption from mandatory disclosure under the Freedom of Information Act (FOIA), records obtained pursuant to Executive Order 11246 shall be made available for inspection if it is determined that the requested inspection furthers the public interest and does not impede agency functions, except in the case of records disclosure of which is prohibited by law. After the Department of Defense's Defense Logistics Agency (DLA), the designated compliance agency responsible for monitoring petitioner's employment practices, informed petitioner that third parties had made an FOIA request for disclosure of certain materials that had been furnished to the DLA by petitioner, petitioner objected to release of the materials. The DLA determined that the materials were subject to disclosure under the FOIA and OFCCP disclosure rules, and petitioner then filed a complaint in the Federal District Court seeking to enjoin release of the documents. Petitioner contended, *inter alia*, that disclosure was barred by the FOIA and was inconsistent with the Trade Secrets Act, 18 U. S. C. § 1905, which imposes criminal sanctions on Government employees who disclose or make known, in any manner or to any extent "not authorized by law," certain classes of information submitted to a Government agency, including trade secrets and confidential statistical data. Finding jurisdiction to subject the disclosure decision to review under the Administrative Procedure Act (APA), the District Court held that certain of the requested information fell within Exemption 4 of the FOIA, relating to trade secrets and commercial or financial information; that whether the requested information may or must be withheld thus

depended on applicable agency regulations; and that here a regulation (29 CFR § 70.21 (a) (1977)) which states that no officer or employee of the Department of Labor is to violate 18 U. S. C. § 1905, and which proscribes specified disclosures if "not authorized by law," required that the information be withheld. Both sides appealed, and the Court of Appeals vacated the District Court's judgment. While agreeing with the District Court that the FOIA does not compel withholding of information that falls within its exemptions, and that analysis must proceed under the APA, the Court of Appeals reached a different conclusion as to the interpretation of 29 CFR § 70.21 (a). In the Court of Appeals' view, disclosures made pursuant to OFCCP disclosure regulations are "authorized by law" by virtue of those regulations.

Held:

1. The FOIA is exclusively a disclosure statute and affords petitioner no private right of action to enjoin agency disclosure. The language, logic, and history of the FOIA show that its provisions exempting specified material from disclosure were only meant to permit the agency to withhold certain information, and were not meant to mandate nondisclosure. Congressional concern was with the *agency's* need or preference for confidentiality; the FOIA by itself protects the interest in confidentiality of private entities submitting information only to the extent that this interest is endorsed by the agency collecting the information. Pp. 290–294.

2. The type of disclosure threatened in this case is not "authorized by law" within the meaning of the Trade Secrets Act on the theory that the OFCCP regulations relied on by DLA were the source of that authorization. Pp. 295–316.

(a) The Act addresses formal agency action as well as acts of individual Government employees, and there is nothing in its legislative history to show that Congress intended the phrase "authorized by law" to have a special, limited meaning different from the traditional understanding that properly promulgated, substantive agency regulations have the "force and effect of law." In order for a regulation to have the "force and effect of law," it must be a "substantive" or "legislative-type" rule affecting individual rights and obligations (as do the regulations in the case at bar), and it must be the product of a congressional grant of legislative authority, promulgated in conformity with any procedural requirements imposed by Congress. Pp. 295–303.

(b) The disclosure regulations at issue in this case cannot be based on § 201 of Executive Order 11246, as amended, and a regulation which permits units in the Department of Labor to promulgate supplemental

disclosure regulations consistent with the FOIA. Since materials that are exempt from disclosure under the FOIA are outside the ambit of that Act, the Government cannot rely on the FOIA as congressional authorization for disclosure regulations that permit the release of information within the Act's exemptions. In order for regulations adopted under § 201 of Executive Order 11246—which speaks in terms of rules and regulations "necessary and appropriate" to achieve the Executive Order's purposes of ending discrimination by the Federal Government and those who deal with it—to have the "force and effect of law," there must be a nexus between the regulations and some delegation of the requisite legislative authority by Congress. When Congress enacted statutes which arguably authorized the Executive Order (the Federal Property and Administration Services Act of 1949, Titles VI and VII of the Civil Rights Act of 1964, and the Equal Employment Opportunity Act of 1972), it was not concerned with public disclosure of trade secrets or confidential business information, and it is not possible to find in these statutes a delegation of the disclosure authority asserted by the Government here. Also, one cannot readily pull from the logic and purposes of the Executive Order any concern with the public's access to information in Government files or the importance of protecting trade secrets or confidential business statistics. Pp. 303–308.

(c) Legislative authority for the OFCCP disclosure regulations cannot be found in 5 U. S. C. § 301, which authorizes heads of Government departments to prescribe regulations to govern internal departmental affairs and the custody and use of its records, and which provides that it does not authorize withholding information from the public or limiting the availability of records to the public. Section 301 is a "housekeeping statute," authorizing rules of agency organization, procedure, or practice as opposed to "substantive rules." There is nothing in the legislative history to indicate that § 301 is a substantive grant of legislative power to promulgate rules authorizing the *release* of trade secrets or confidential business information. Thus, § 301 does not authorize regulations limiting the scope of the Trade Secrets Act. Pp. 308–312.

(d) There is also a procedural defect in the OFCCP disclosure regulations that precludes courts from affording them the force and effect of law, since they were promulgated as "interpretative rules" without complying with the APA's requirement that interested persons be given general notice of an agency's proposed rulemaking and an opportunity to comment before a "substantive rule" is promulgated. An "interpretative regulation" cannot be the "authoriz[ation] by law" required by the Trade Secrets Act. Pp. 312–316.

3. However, the Trade Secrets Act does not afford a private right of action to enjoin disclosure in violation of the statute. Where this Court has implied a private right of action under a criminal statute "there was at least a statutory basis for inferring that a civil cause of action of some sort lay in favor of someone." *Cort* v. *Ash*, 422 U. S. 66, 79. Nothing in the Trade Secrets Act prompts such an inference; nor is there any indication of legislative intent to create a private right of action. Most importantly, a private right of action under the Act is not necessary to make effective the congressional purpose, since review of DLA's decision to disclose petitioner's employment data is available under the APA. Pp. 316–317.

4. Since the Trade Secrets Act and any "authoriz[ation] by law" contemplated by that Act place substantive limits on agency action, DLA's decision to disclose petitioner's reports is reviewable agency action and petitioner is a person "adversely affected or aggrieved" within the meaning of the APA's provision affording the right of judicial review of agency action to such a person. Because the Court of Appeals did not reach the issue whether disclosure of petitioner's documents was barred by the Trade Secrets Act, the case is remanded in order that the Court of Appeals may consider whether the contemplated disclosures would violate the Act. Pp. 317–319.

565 F. 2d 1172, vacated and remanded.

REHNQUIST, J., delivered the opinion for a unanimous Court. MARSHALL, J., filed a concurring opinion, *post*, p. 319.

Burt A. Braverman argued the cause for petitioner. With him on the briefs was *A. William Rolf.*

Assistant Attorney General Babcock argued the cause for respondents. With her on the brief were *Solicitor General McCree, Leonard Schaitman,* and *Paul Blankenstein.**

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*Briefs of *amici curiae* urging reversal were filed by *Paul L. Gomory* for the Association for the Advancement of Invention and Innovation; by *Joseph A. Keyes, Jr.*, for the Association of American Medical Colleges; by *Robert L. Ackerly, Thomas L. Patten, Kenneth W. Weinstein, Lawrence B. Kraus,* and *Stanley T. Kaleczyc* for the Chamber of Commerce of the United States; by *Michael S. Horne, Bruce D. Sokler, Stephen R. Mysliwiec, Robert E. Williams,* and *Douglas S. McDowell* for the Equal

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

The expanding range of federal regulatory activity and growth in the Government sector of the economy have increased federal agencies' demands for information about the activities of private individuals and corporations. These developments have paralleled a related concern about secrecy in Government and abuse of power. The Freedom of Information Act (hereinafter FOIA) was a response to this concern, but it has also had a largely unforeseen tendency to exacerbate the uneasiness of those who comply with governmental demands for information. For under the FOIA third parties have been able to obtain Government files containing information submitted by corporations and individuals who thought that the information would be held in confidence.

This case belongs to a class that has been popularly denominated "reverse-FOIA" suits. The Chrysler Corp. (hereinafter Chrysler) seeks to enjoin agency disclosure on the grounds that it is inconsistent with the FOIA and 18 U. S. C. § 1905, a criminal statute with origins in the 19th century that proscribes disclosure of certain classes of business and personal information. We agree with the Court of Appeals for the Third Circuit that the FOIA is purely a disclosure statute and affords Chrysler no private right of action to enjoin agency disclosure. But we cannot agree with that court's conclusion that this disclosure is "authorized by law" within the meaning of § 1905. Therefore, we vacate the Court of Appeals' judgment and remand so that it can consider

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Employment Advisory Council; and by *Leonard J. Theberge* and *Edward H. Dowd* for the Scientists and Engineers for Secure Energy et al.

Charles E. Hill filed a brief for the Consumer Federation of America et al. as *amici curiae* urging affirmance.

Briefs of *amici curiae* were filed by *Thomas L. Pfister* for Hughes Aircraft Co.; by *Richmond C. Coburn* and *Thomas E. Douglass* for the National Security Industrial Assn.; and by *George A. Sears* and *C. Douglas Floyd* for Standard Oil Co. of California.

whether the documents at issue in this case fall within the terms of § 1905.

I

As a party to numerous Government contracts, Chrysler is required to comply with Executive Orders 11246 and 11375, which charge the Secretary of Labor with ensuring that corporations that benefit from Government contracts provide equal employment opportunity regardless of race or sex.[1] The United States Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) has promulgated regulations which require Government contractors to furnish reports and other information about their affirmative-action programs and the general composition of their work forces.[2]

The Defense Logistics Agency (DLA) (formerly the Defense Supply Agency) of the Department of Defense is the designated compliance agency responsible for monitoring Chrysler's employment practices.[3] OFCCP regulations require that Chrysler make available to this agency written affirmative-action programs (AAP's) and annually submit Employer Information Reports, known as EEO–1 Reports. The agency may also conduct "compliance reviews" and "complaint investigations," which culminate in Compliance Review Reports (CRR's) and Complaint Investigation Reports (CIR's), respectively.[4]

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[1] Executive Order No. 11246, 3 CFR 339 (1964–1965 Comp.), prohibits discrimination on the basis of "race, creed, color, or national origin" in federal employment or by Government contractors. Under § 202 of this Executive Order, most Government contracts must contain a provision whereby the contractor agrees not to discriminate in such a fashion and to take affirmative action to ensure equal employment opportunity. With promulgation of Executive Order No. 11375, 3 CFR 684 (1966–1970 Comp.), in 1967, President Johnson extended the requirements of the 1965 Order to prohibit discrimination on the basis of sex.

[2] 41 CFR §§ 60–1.3, 60–1.7 (1978).

[3] For convenience all references will be to DLA.

[4] 41 CFR §§ 60–1.20, 60–1.24 (1978). The term "alphabet soup" gained currency in the early days of the New Deal as a description of the prolif-

Regulations promulgated by the Secretary of Labor provide for public disclosure of information from records of the OFCCP and its compliance agencies. Those regulations state that notwithstanding exemption from mandatory disclosure under the FOIA, 5 U. S. C. § 552,

> "records obtained or generated pursuant to Executive Order 11246 (as amended) . . . shall be made available for inspection and copying . . . if it is determined that the requested inspection or copying furthers the public interest and does not impede any of the functions of the OFCC[P] or the Compliance Agencies except in the case of records disclosure of which is prohibited by law." [5]

It is the voluntary disclosure contemplated by this regulation, over and above that mandated by the FOIA, which is the gravamen of Chrysler's complaint in this case.

This controversy began on May 14, 1975, when the DLA informed Chrysler that third parties had made an FOIA request for disclosure of the 1974 AAP for Chrysler's Newark, Del., assembly plant and an October 1974 CIR for the same facility. Nine days later, Chrysler objected to release of the requested information, relying on OFCCP's disclosure regulations and on exemptions to the FOIA. Chrysler also requested a copy of the CIR, since it had never seen it. DLA responded the following week that it had determined that the requested material was subject to disclosure under the FOIA and the OFCCP disclosure rules, and that both documents would be released five days later.

On the day the documents were to be released, Chrysler filed a complaint in the United States District Court for Delaware

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eration of new agencies such as WPA and PWA. The terminology required to describe the present controversy suggests that the "alphabet soup" of the New Deal era was, by comparison, a clear broth.

[5] § 60–40.2 (a). The regulations also state that EEO–1 Reports "shall be disclosed," § 60–40.4, and that AAP's "must be disclosed" if not within limited exceptions. §§ 60–40.2 (b) (1), 60–40.3.

seeking to enjoin release of the Newark documents. The District Court granted a temporary restraining order barring disclosure of the Newark documents and requiring that DLA give five days' notice to Chrysler before releasing any similar documents. Pursuant to this order, Chrysler was informed on July 1, 1975, that DLA had received a similar request for information about Chrysler's Hamtramck, Mich., plant. Chrysler amended its complaint and obtained a restraining order with regard to the Hamtramck disclosure as well.

Chrysler made three arguments in support of its prayer for an injunction: that disclosure was barred by the FOIA; that it was inconsistent with 18 U. S. C. § 1905, 42 U. S. C. § 2000e–8 (e), and 44 U. S. C. § 3508, which for ease of reference will be referred to as the "confidentiality statutes"; and finally that disclosure was an abuse of agency discretion insofar as it conflicted with OFCCP rules. The District Court held that it had jurisdiction under 28 U. S. C. § 1331 to subject the disclosure decision to review under the Administrative Procedure Act (APA). 5 U. S. C. §§ 701–706. It conducted a trial *de novo* on all of Chrysler's claims; both sides presented extensive expert testimony during August 1975.

On April 20, 1976, the District Court issued its opinion. It held that certain of the requested information, the "manning" tables, fell within Exemption 4 of the FOIA.[6] The District Court reasoned from this holding that the tables may or must be withheld, depending on applicable agency regulations, and that here a governing regulation required that the information be withheld. Pursuant to 5 U. S. C. § 301, the enabling statute which gives federal department heads control over department records, the Secretary of Labor has promulgated a regulation, 29 CFR § 70.21 (a) (1978), stating that no officer or employee of the Department is to violate 18 U. S. C. § 1905. That section imposes criminal sanctions on Government em-

[6] Manning tables are lists of job titles and of the number of people who perform each job.

ployees who make unauthorized disclosure of certain classes of information submitted to a Government agency, including trade secrets and confidential statistical data. In essence, the District Court read § 1905 as not merely a prohibition of unauthorized disclosure of sensitive information by Government employees, but as a restriction on official agency actions taken pursuant to promulgated regulations.

Both sides appealed, and the Court of Appeals for the Third Circuit vacated the District Court's judgment. *Chrysler Corp.* v. *Schlesinger*, 565 F. 2d 1172 (1977). It agreed with the District Court that the FOIA does not compel withholding of information that falls within its nine exemptions. It also, like the District Court, rejected Chrysler's reliance on the confidentiality statutes, either because there was no implied private right of action to proceed under the statute, or because the statute, by its terms, was not applicable to the information at issue in this case. It agreed with the District Court that analysis must proceed under the APA. But it disagreed with that court's interpretation of 29 CFR § 70.21 (a). By the terms of that regulation, the specified disclosures are only proscribed if "not authorized by law," the standard of 18 U. S. C. § 1905. In the Court of Appeals' view, disclosures made pursuant to OFCCP disclosure regulations are "authorized by law" by virtue of those regulations. Therefore, it held that 29 CFR § 70.21 (a) was inapplicable.

The Court of Appeals also disagreed with the District Court's view of the scope of review under the APA. It held that the District Court erred in conducting a *de novo* review; review should have been limited to the agency record. However, the Court of Appeals found that record inadequate in this case and directed that the District Court remand to the agency for supplementation. Because of a conflict in the Circuits [7] and the general importance of these "reverse-FOIA"

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[7] Compare *Westinghouse Electric Corp.* v. *Schlesinger*, 542 F. 2d 1190 (CA4 1976), cert. denied, 431 U. S. 924 (1977), with *Sears, Roebuck & Co.*

cases, we granted certiorari, 435 U. S. 914, and now vacate the judgment of the Third Circuit and remand for further proceedings.

II

We have decided a number of FOIA cases in the last few years.[8] Although we have not had to face squarely the question whether the FOIA *ex proprio vigore* forbids governmental agencies from disclosing certain classes of information to the public, we have in the course of at least one opinion intimated an answer.[9] We have, moreover, consistently recognized that the basic objective of the Act is disclosure.[10]

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v. *Eckerd*, 575 F. 2d 1197 (CA7 1978); *General Dynamics Corp.* v. *Marshall*, 572 F. 2d 1211 (CA8 1978); *Pennzoil Co.* v. *FPC*, 534 F. 2d 627 (CA5 1976); *Charles River Park "A," Inc.* v. *Department of HUD*, 171 U. S. App. D. C. 286, 519 F. 2d 935 (1975).

[8] *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U. S. 214 (1978); *Department of Air Force* v. *Rose*, 425 U. S. 352 (1976); *FAA Administrator* v. *Robertson*, 422 U. S. 255 (1975); *NLRB* v. *Sears, Roebuck & Co.*, 421 U. S. 132 (1975); *Renegotiation Bd.* v. *Grumman Aircraft Engineering Corp.*, 421 U. S. 168 (1975); *Renegotiation Bd.* v. *Bannercraft Clothing Co.*, 415 U. S. 1 (1974); *EPA* v. *Mink*, 410 U. S. 73 (1973).

[9] "Subsection (b) of the Act creates nine exemptions from compelled disclosures. These exemptions are explicitly made exclusive, 5 U. S. C. § 552 (c), and are plainly intended to set up concrete, workable standards for determining whether particular material *may* be withheld or *must* be disclosed." *EPA* v. *Mink*, *supra*, at 79 (emphasis added).

[10] We observed in *Department of Air Force* v. *Rose*, *supra*, at 361, that "disclosure, not secrecy, is the dominant objective of the Act." The legislative history is replete with references to Congress' desire to loosen the agency's grip on the data underlying governmental decisionmaking.

"A democratic society requires an informed, intelligent electorate, and the intelligence of the electorate varies as the quantity and quality of its information varies. . . .

"[The FOIA] provides the necessary machinery to assure the availability of Government information necessary to an informed electorate." H. R. Rep. No. 1497, 89th Cong., 2d Sess., 12 (1966).

"Although the theory of an informed electorate is vital to the proper operation of a democracy, there is nowhere in our present law a statute

In contending that the FOIA bars disclosure of the requested equal employment opportunity information, Chrysler relies on the Act's nine exemptions and argues that they require an agency to withhold exempted material. In this case it relies specifically on Exemption 4:

> "(b) [FOIA] does not apply to matters that are—
>
> . . . . .
>
> "(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential . . . ." 5 U. S. C. § 552 (b)(4).

Chrysler contends that the nine exemptions in general, and Exemption 4 in particular, reflect a sensitivity to the privacy interests of private individuals and nongovernmental entities. That contention may be conceded without inexorably requiring the conclusion that the exemptions impose affirmative duties on an agency to withhold information sought.[11] In fact, that conclusion is not supported by the language, logic, or history of the Act.

The organization of the Act is straightforward. Subsection

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which affirmatively provides for that information." S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965).

[11] See, *e. g.*, H. R. Rep. No. 1497, *supra*, at 10 (emphasis added; footnote omitted):

"[Exemption 4] would assure the confidentiality of information obtained by the Government through questionnaires or through material submitted and disclosures made in procedures such as the mediation of labor-management controversies. It exempts such material if it would not customarily be made public by the person from whom it was obtained by the Government. . . . It would . . . include information which is given to an agency in confidence, since a citizen must be able to confide in his Government. Moreover, *where the Government has obligated itself in good faith not to disclose documents or information which it receives, it should be able to honor such obligations.*"

The italicized passage is obviously consistent with Exemption 4's being an exception to the disclosure mandate of the FOIA and not a limitation on agency discretion.

(a), 5 U. S. C. § 552 (a), places a general obligation on the agency to make information available to the public and sets out specific modes of disclosure for certain classes of information. Subsection (b), 5 U. S. C. § 552 (b), which lists the exemptions, simply states that the specified material is not subject to the disclosure obligations set out in subsection (a). By its terms, subsection (b) demarcates the agency's obligation to disclose; it does not foreclose disclosure.

That the FOIA is exclusively a disclosure statute is, perhaps, demonstrated most convincingly by examining its provision for judicial relief. Subsection (a)(4)(B) gives federal district courts "jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U. S. C. § 552 (a)(4)(B). That provision does not give the authority to bar disclosure, and thus fortifies our belief that Chrysler, and courts which have shared its view, have incorrectly interpreted the exemption provisions of the FOIA. The Act is an attempt to meet the demand for open government while preserving workable confidentiality in governmental decisionmaking.[12] Congress appreciated that, with the expanding sphere of governmental regulation and enterprise, much of the information within Government files has been submitted by private entities seeking Government contracts or responding to unconditional reporting obligations imposed by law. There was sentiment that Government agencies should have the latitude, in certain circumstances, to afford the confidentiality desired by these submitters.[13] But the congressional concern

[12] See S. Rep. No. 813, *supra*, at 3:

"It is not an easy task to balance the opposing interests, but it is not an impossible one either. It is not necessary to conclude that to protect one of the interests, the other must, of necessity, either be abrogated or substantially subordinated. Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure."

[13] *Id.*, at 9; n. 11, *supra*.

was with the *agency's* need or preference for confidentiality; the FOIA by itself protects the submitters' interest in confidentiality only to the extent that this interest is endorsed by the agency collecting the information.

Enlarged access to governmental information undoubtedly cuts against the privacy concerns of nongovernmental entities, and as a matter of policy some balancing and accommodation may well be desirable. We simply hold here that Congress did not design the FOIA exemptions to be mandatory bars to disclosure.[14]

This conclusion is further supported by the legislative history. The FOIA was enacted out of dissatisfaction with § 3 of the APA, which had not resulted in as much disclosure by the agencies as Congress later thought desirable.[15] Statements in both the Senate and House Reports on the effect of the exemptions support the interpretation that the exemp-

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[14] It is informative in this regard to compare the FOIA with the Privacy Act of 1974, 5 U. S. C. § 552a. In the latter Act, Congress explicitly requires agencies to withhold records about an individual from most third parties unless the subject gives his permission. Even more telling is 49 U. S. C. § 1357, a section which authorizes the Administrator of the FAA to take antihijacking measures, including research and development of protection devices.

"Notwithstanding [the FOIA], the Administrator shall prescribe such regulations as he may deem necessary to prohibit disclosure of any information obtained or developed in the conduct of research and development activities under this subsection if, in the opinion of the Administrator, the disclosure of such information—

. . . . . .

"(B) would reveal trade secrets or privileged or confidential commercial or financial information obtained from any person . . . ." § 1357 (d) (2) (B).

[15] Section 3 of the original APA provided that an agency should generally publish or make available organizational data, general statements of policy, rules, and final orders. Exception was made for matters "requiring secrecy in the public interest" or "relating solely to the internal management of an agency." This original version of § 3 was repealed with passage of the FOIA. See *EPA* v. *Mink*, 410 U. S. 73 (1973).

tions were only meant to permit the agency to withhold certain information, and were not meant to mandate nondisclosure. For example, the House Report states:

> "[The FOIA] sets up workable standards for the categories of records which *may* be exempt from public disclosure . . . ."
>
> ". . . There may be legitimate reasons for nondisclosure and [the FOIA] is designed to *permit* nondisclosure in such cases."
>
> "[The FOIA] lists in a later subsection the specific categories of information which *may* be exempted from disclosure." [16]

We therefore conclude that Congress did not limit an agency's discretion to disclose information when it enacted the FOIA. It necessarily follows that the Act does not afford Chrysler any right to enjoin agency disclosure.

III

Chrysler contends, however, that even if its suit for injunctive relief cannot be based on the FOIA, such an action can be premised on the Trade Secrets Act, 18 U. S. C. § 1905. The Act provides:

> "Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such

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[16] H. R. Rep. No. 1497, 89th Cong., 2d Sess., 2, 5, 7 (1966) (emphasis added). See also S. Rep. No. 813, 89th Cong., 1st Sess., 10 (1965). Congressman Moss, the House sponsor of the FOIA, described the exemptions on the House floor as indicating what documents "may be withheld." 112 Cong. Rec. 13641 (1966).

> department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment."

There are necessarily two parts to Chrysler's argument: that § 1905 is applicable to the type of disclosure threatened in this case, and that it affords Chrysler a private right of action to obtain injunctive relief.

A

The Court of Appeals held that § 1905 was not applicable to the agency disclosure at issue here because such disclosure was "authorized by law" within the meaning of the Act. The court found the source of that authorization to be the OFCCP regulations that DLA relied on in deciding to disclose information on the Hamtramck and Newark plants.[17] Chrysler contends here that these agency regulations are not "law" within the meaning of § 1905.

It has been established in a variety of contexts that properly promulgated, substantive agency regulations have the "force and effect of law."[18] This doctrine is so well established that agency regulations implementing federal statutes have been

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[17] 41 CFR §§ 60.40–1 to 60.40–4 (1978).

[18] *E. g., Batterton* v. *Francis*, 432 U. S. 416, 425 n. 9 (1977); *Foti* v. *INS*, 375 U. S. 217, 223 (1963); *United States* v. *Mersky*, 361 U. S. 431, 437–438 (1960); *Atchison, T. & S. F. R. Co.* v. *Scarlett*, 300 U. S. 471, 474 (1937).

held to pre-empt state law under the Supremacy Clause.[19] It would therefore take a clear showing of contrary legislative intent before the phrase "authorized by law" in § 1905 could be held to have a narrower ambit than the traditional understanding.

The origins of the Trade Secrets Act can be traced to Rev. Stat. § 3167, an Act which barred unauthorized disclosure of specified business information by Government revenue officers. There is very little legislative history concerning the original bill, which was passed in 1864.[20] It was re-enacted numerous times, with some modification, and remained part of the revenue laws until 1948.[21] Congressional statements made at the time of these re-enactments indicate that Congress was primarily concerned with unauthorized disclosure of business information by feckless or corrupt revenue agents,[22] for

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[19] *Paul* v. *United States*, 371 U. S. 245 (1963); *Free* v. *Bland*, 369 U. S. 663 (1962); *Public Utilities Comm'n of California* v. *United States*, 355 U. S. 534 (1958).

[20] Revenue Act of 1864, § 38, 13 Stat. 238.

[21] The last version was codified as 18 U. S. C. § 216 (1940 ed.):

"It shall be unlawful for any collector, deputy collector, agent, clerk, or other officer or employee of the United States to divulge or to make known in any manner whatever not provided by law to any person the operations, style of work, or apparatus of any manufacturer or producer visited by him in the discharge of his official duties, or the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any income return, or to permit any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; and it shall be unlawful for any person to print or publish in any manner whatever not provided by law any income return, or any part thereof or source of income, profits, losses, or expenditures appearing in any income return; and any offense against the foregoing provision shall be a misdemeanor and be punished by a fine not exceeding $1,000 or by imprisonment not exceeding one year, or both, at the discretion of the court; and if the offender be an officer or employee of the United States he shall be dismissed from office or discharged from employment."

[22] See, *e. g.*, 26 Cong. Rec. 6893 (1894) (Sen. Aldrich) (expressing con-

in the early days of the Bureau of Internal Revenue, it was the field agents who had substantial contact with confidential financial information.[23]

In 1948, Rev. Stat. § 3167 was consolidated with two other statutes—involving the Tariff Commission and the Department of Commerce—to form the Trade Secrets Act.[24] The statute governing the Tariff Commission was very similar to Rev. Stat. § 3167, and it explicitly bound members of the Commission as well as Commission employees.[25] The Com-

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cern that taxpayer's confidential information is "to be turned over to the tender mercies of poorly paid revenue agents"); *id.*, at 6924 (Sen. Teller) (exposing records to the "idle curiosity of a revenue officer"). See also Cong. Globe, 38th Cong., 1st Sess., 2997 (1864) (Rep. Brown) (expressing concern that 1864 revenue provisions would allow "every little petty officer" to investigate the affairs of private citizens).

[23] There was virtually no Washington bureaucracy created by the Act of July 1, 1862, ch. 119, 12 Stat. 432, the statute to which the present Internal Revenue Service can be traced. Researchers report that during the Civil War 85% of the operations of the Bureau of Internal Revenue were carried out in the field—"including the assessing and collection of taxes, the handling of appeals, and punishment for frauds"—and this balance of responsibility was not generally upset until the 20th century. L. Schmeckebier & F. Eble, The Bureau of Internal Revenue 8, 40–43 (1923). Agents had the power to enter any home or business establishment to look for taxable property and examine books of accounts. Information was collected and processed in the field. It is, therefore, not surprising to find that congressional comments during this period focused on potential abuses by agents in the field and not on breaches of confidentiality by a Washington-based bureaucracy.

[24] See H. R. Rep. No. 304, 80th Cong., 1st Sess., A127–A128 (1947).

[25] The Tariff Commission statute, last codified as 19 U. S. C. § 1335 (1940 ed.), provided:

"It shall be unlawful for any member of the commission, or for any employee, agent, or clerk of the commission, or any other officer or employee of the United States, to divulge, or to make known in any manner whatever not provided for by law, to any person, the trade secrets or processes of any person, firm, copartnership, corporation, or association embraced in any examination or investigation conducted by the commis-

merce Department statute embodied some differences in form. It was a mandate addressed to the Bureau of Foreign and Domestic Commerce and to its Director, but there was no reference to Bureau employees and it contained no criminal sanctions.[26] Unlike the other statutes, it also had no exception for disclosures "authorized by law." In its effort to "consolidat[e]" the three statutes, Congress enacted § 1905 and essentially borrowed the form of Rev. Stat. § 3167 and the Tariff Commission statute.[27] We find nothing in the legislative history of § 1905 and its predecessors which lends support to Chrysler's contention that Congress intended the phrase "authorized by law," as used in § 1905, to have a special, limited meaning.

Nor do we find anything in the legislative history to support the respondents' suggestion that § 1905 does not address formal agency action—*i. e.*, that it is essentially an "antileak" statute that does not bind the heads of governmental departments or agencies. That would require an expansive and unprecedented holding that any agency action directed or approved by an agency head is "authorized by law," regard-

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sion, or by order of the commission, or by order of any member thereof. Any offense against the provisions of this section shall be a misdemeanor and be punished by a fine not exceeding $1,000, or by imprisonment not exceeding one year, or both, in the discretion of the court, and such offender shall also be dismissed from office or discharged from employment."

[26] 15 U. S. C. § 176a (1940 ed.):

"Any statistical information furnished in confidence to the Bureau of Foreign and Domestic Commerce by individuals, corporations, and firms shall be held to be confidential, and shall be used only for the statistical purposes for which it is supplied. The Director of the Bureau of Foreign and Domestic Commerce shall not permit anyone other than the sworn employees of the Bureau to examine such individual reports, nor shall he permit any statistics of domestic commerce to be published in such manner as to reveal the identity of the individual, corporation, or firm furnishing such data."

[27] H. R. Rep. No. 304, *supra* n. 24, at A127.

less of the statutory authority for that action. As Attorney General Brownell recognized not long after § 1905 was enacted, such a reading is difficult to reconcile with Congress' intent to consolidate the Tariff Commission and Commerce Department statutes, both of which explicitly addressed ranking officials, with Rev. Stat. § 3167.[28] It is also inconsistent with a settled understanding—previously shared by the Department of Justice—that has been continually articulated and relied upon in Congress during the legislative efforts in the last three decades to increase public access to Government information.[29] Although the existence of this understanding

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[28] In a December 1, 1953, opinion, the Attorney General advised the Secretary of the Treasury that he should regard himself as bound by § 1905. The Attorney General noted:

"The reviser of the Criminal Code describes the provision as a consolidation of three other sections formerly appearing in the United States Code. Of the three, two expressly operated as prohibitions on the heads of agencies." 41 Op. Atty. Gen. 166, 167 (footnote omitted).

See also *id.*, at 221 (Atty. Gen. Brownell advising Federal Communications Commission Chairman to regard himself as bound).

[29] If we accepted the respondents' position, 18 U. S. C. § 1905 would simply be irrelevant to the issue of public access to agency information. The FOIA and other such "access" legislation are concerned with formal agency action—to what extent can an agency or department or, put differently, the head of an agency or department withhold information contained within the governmental unit's files. It is all but inconceivable that a Government employee would *withhold* information which his superiors had directed him to release; and these Acts are simply not addressed to *disclosure* by a Government employee that is not sanctioned by the employing agency. This is not to say that the actions of individual employees might not be inconsistent with the access legislation. But such actions are only inconsistent insofar as they are imputed to the agencies themselves. Therefore, if § 1905 is not addressed to formal agency action—*i. e.*, action approved by the agency or department head--there should have been no concern in Congress regarding the interrelationship of § 1905 and the access legislation, for they would then address totally different types of disclosure.

In fact, the legislative history of all the significant access legislation of the last 20 years evinces a concern with this relationship and a

is not by any means dispositive, it does shed some light on the intent of the enacting Congress. See *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 380–381 (1969); *FHA*

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concomitant universal assumption that § 1905 embraces formal agency action. Congress was assured that the 1958 amendment to 5 U. S. C. § 301, the housekeeping statute that affords department heads custodial responsibility for department records, would not circumscribe the confidentiality mandated by § 1905. The 1958 amendment simply clarified that § 301 itself was not substantive authority to withhold information. See *infra*, at 310–312. Also in 1958 the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary conducted hearings on the power of the President to withhold information from Congress. As part of the investigative effort, a list was compiled of all statutes restricting disclosure of Government information. Section 1905 was listed among them. Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary on S. 921, 85th Cong., 2d Sess., pt. 2, p. 986 (1958). Two years later, the House Committee on Government Operations conducted a study on statutory authorities restricting or requiring the release of information under the control of executive departments or independent agencies, and again prominent among the statutes "affecting the availability of information to the public" was 18 U. S. C. § 1905. House Committee on Government Operations, Federal Statutes on the Availability of Information 262 (Comm. Print. 1960) (§ 1905 denominated as statute prohibiting the disclosure of certain information).

In *FAA Administrator* v. *Robertson*, 422 U. S., at 264–265, we recognized the importance of these lists in Congress' later deliberations concerning the FOIA, particularly in the consideration of the original Exemption 3. That Exemption excepted from the operation of the FOIA matters "specifically exempted from disclosure by statute." As we noted in *Robertson:*

"When the House Committee on Government Operations focused on Exemption 3, it took note that there are 'nearly 100 statutes or parts of statutes which restrict public access to specific Government records. *These would not be modified* by the public records provisions of [the FOIA].' H. R. Rep. No. 1497, 89th Cong., 2d Sess., 10 (1966). (Emphasis added.)" *Id.*, at 265.

In determining that the statute at issue in *Robertson*, 49 U. S. C. § 1504, was within Exemption 3, we observed that the statute was on these prior lists and that the Civil Aeronautics Board had brought the statute to the attention of both the House and Senate Committees as an exempting statute during the hearings on the FOIA. 422 U. S., at 264, and n. 11. In

v. *The Darlington, Inc.*, 358 U. S. 84, 90 (1958). In sum, we conclude that § 1905 does address formal agency action and that the appropriate inquiry is whether OFCCP's regulations provide the "authoriz[ation] by law" required by the statute.

In order for a regulation to have the "force and effect of law," it must have certain substantive characteristics and be the product of certain procedural requisites. The central distinction among agency regulations found in the APA is that between "substantive rules" on the one hand and "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice" on the other.[30] A "sub-

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fact, during those hearings 18 U. S. C. § 1905 was the most frequently cited restriction on agency or department disclosure of information. Hearings before the Subcommittee of the House Committee on Government Operations on H. R. 5012 et al., 89th Cong., 1st Sess., 283 (1965) (cited by 28 agencies as authority for withholding information). Among those citing the statute was the Department of Justice. *Id.*, at 386 ("commercial information received or assembled in connection with departmental functions must be withheld pursuant to these requirements"). See also *id.*, at 20 (colloquy between Rep. Moss and Asst. Atty. Gen. Schlei); Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act 31–32 (June 1967) (18 U. S. C. § 1905 among the "nearly 100 statutes" mentioned in the House Report).

Most recently, in its Report on the Government in the Sunshine Act, the House Committee on Government Operations observed:

"[T]he Trade Secrets Act, 18 U. S. C. § 1905, which relates only to the disclosure of information where disclosure is 'not authorized by law,' would not permit the withholding of information otherwise required to be disclosed by the Freedom of Information Act, since the disclosure is there authorized by law. Thus, for example, if material did not come within the broad trade secrets exemption contained in the Freedom of Information Act, section 1905 would not justify withholding; on the other hand, if material is within the trade secrets exemption of the Freedom of Information Act and therefore subject to disclosure if the agency determines that disclosure is in the public interest, section 1905 must be considered to ascertain whether the agency is forbidden from disclosing the information." H. R. Rep. No. 94–880, pt. 1, p. 23 (1976).

[30] 5 U. S. C. §§ 553 (b), (d).

stantive rule" is not defined in the APA, and other authoritative sources essentially offer definitions by negative inference.[31] But in *Morton* v. *Ruiz*, 415 U. S. 199 (1974), we noted a characteristic inherent in the concept of a "substantive rule." We described a substantive rule—or a "legislative-type rule," *id.*, at 236—as one "affecting individual rights and obligations." *Id.*, at 232. This characteristic is an important touchstone for distinguishing those rules that may be "binding" or have the "force of law." *Id.*, at 235, 236.

That an agency regulation is "substantive," however, does not by itself give it the "force and effect of law." The legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes. As this Court noted in *Batterton* v. *Francis*, 432 U. S. 416, 425 n. 9 (1977):

> "Legislative, or substantive, regulations are 'issued by an agency pursuant to statutory authority and . . . imple-

[31] Neither the House nor Senate Report attempted to expound on the distinction. In prior cases, we have given some weight to the Attorney General's Manual on the Administrative Procedure Act (1947), since the Justice Department was heavily involved in the legislative process that resulted in the Act's enactment in 1946. See *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U. S. 519, 546 (1978); *Power Reactor Co.* v. *Electricians*, 367 U. S. 396, 408 (1961); *United States* v. *Zucca*, 351 U. S. 91, 96 (1956).

The Manual refers to substantive rules as rules that "implement" the statute. "Such rules have the force and effect of law." Manual, *supra*, at 30 n. 3. In contrast it suggests that "interpretive rules" and "general statements of policy" do not have the force and effect of law. Interpretive rules are "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." *Ibid.* General statements of policy are "statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power." *Ibid.* See also Final Report of Attorney General's Committee on Administrative Procedure 27 (1941).

> ment the statute, as, for example, the proxy rules issued by the Securities and Exchange Commission . . . . Such rules have the force and effect of law.' " [32]

Likewise the promulgation of these regulations must conform with any procedural requirements imposed by Congress. *Morton* v. *Ruiz, supra,* at 232. For agency discretion is limited not only by substantive, statutory grants of authority, but also by the procedural requirements which "assure fairness and mature consideration of rules of general application." *NLRB* v. *Wyman-Gordon Co.,* 394 U. S. 759, 764 (1969). The pertinent procedural limitations in this case are those found in the APA.

The regulations relied on by the respondents in this case as providing "authoriz[ation] by law" within the meaning of § 1905 certainly affect individual rights and obligations; they govern the public's right to information in records obtained under Executive Order 11246 and the confidentiality rights of those who submit information to OFCCP and its compliance agencies. It is a much closer question, however, whether they are the product of a congressional grant of legislative authority.

In his published memorandum setting forth the disclosure regulations at issue in this case, the Secretary of Labor states that the authority upon which he relies in promulgating the regulations are § 201 of Executive Order 11246, as amended, and 29 CFR § 70.71 (1978), which permits units in the Department of Labor to promulgate supplemental disclosure regulations consistent with 29 CFR pt. 70 and the FOIA. 38 Fed. Reg. 3192–3194 (1973). Since materials that are exempt from disclosure under the FOIA are by virtue of Part II of this opinion outside the ambit of that Act, the Government cannot rely on the FOIA as congressional authorization for

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[32] Quoting Attorney General's Manual on the Administrative Procedure Act, *supra,* at 30 n. 3.

disclosure regulations that permit the release of information within the Act's nine exemptions.

Section 201 of Executive Order 11246 directs the Secretary of Labor to "adopt such rules and regulations and issue such orders as he deems necessary and appropriate to achieve the purposes thereof." But in order for such regulations to have the "force and effect of law," it is necessary to establish a nexus between the regulations and some delegation of the requisite legislative authority by Congress. The origins of the congressional authority for Executive Order 11246 are somewhat obscure and have been roundly debated by commentators and courts.[33] The Order itself as amended establishes a program to eliminate employment discrimination by the Federal Government and by those who benefit from Government contracts. For purposes of this case, it is not necessary to decide whether Executive Order 11246 as amended is authorized by the Federal Property and Administrative Services Act of 1949,[34] Titles VI

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[33] See, *e. g.*, *Contractors Assn. of Eastern Pa.* v. *Secretary of Labor*, 442 F. 2d 159 (CA3), cert. denied, 404 U. S. 854 (1971); Hearings before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary on the Philadelphia Plan and S. 931, 91st Cong., 1st Sess. (1969); Jones, The Bugaboo of Employment Quotas, 1970 Wis. L. Rev. 341; Leiken, Preferential Treatment in the Skilled Building Trades: An Analysis of the Philadelphia Plan, 56 Cornell L. Rev. 84 (1970); Comment, The Philadelphia Plan: A Study in the Dynamics of Executive Power, 39 U. Chi. L. Rev. 723 (1972); Note, Executive Order 11246: Anti-Discrimination Obligations in Government Contracts, 44 N. Y. U. L. Rev. 590 (1969).

The Executive Order itself merely states that it is promulgated "[u]nder and by virtue of the authority vested in [the] President of the United States by the Constitution and statutes of the United States." 3 CFR 339 (1964–1965 Comp.).

[34] 63 Stat. 377, as amended, 40 U. S. C. § 471 *et seq.* The Act as amended is prefaced with the following declaration of policy:

"It is the intent of the Congress in enacting this legislation to provide for the Government an economical and efficient system for (a) the procurement and supply of personal property and nonpersonal services, including related functions such as contracting, inspection, storage, issue, specifica-

and VII of the Civil Rights Act of 1964,[35] the Equal Employment Opportunity Act of 1972,[36] or some more general notion that the Executive can impose reasonable contractual require-

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tions, property identification and classification, transportation and traffic management, establishment of pools or systems for transportation of Government personnel and property by motor vehicle within specific areas, management of public utility services, repairing and converting, establishment of inventory levels, establishment of forms and procedures, and representation before Federal and State regulatory bodies; (b) the utilization of available property; (c) the disposal of surplus property; and (d) records management." 40 U. S. C. § 471.

The Act explicitly authorizes Executive Orders "necessary to effectuate [its] provisions." § 486 (a). However, nowhere in the Act is there a specific reference to employment discrimination.

Lower courts have suggested that § 486 (a) was the authority for predecessors of Executive Order 11246. *Farmer* v. *Philadelphia Electric Co.*, 329 F. 2d 3 (CA3 1964); *Farkas* v. *Texas Instrument, Inc.*, 375 F. 2d 629 (CA5), cert. denied, 389 U. S. 977 (1967). But as the Third Circuit noted in *Contractors Assn. of Eastern Pa.* v. *Secretary of Labor, supra,* at 167, these suggestions were dicta and made without any analysis of the nexus between the Federal Property and Administrative Services Act and the Executive Orders. It went on to hold, however, that § 486 (a) was authority for at least some aspects of Executive Order 11246 on the ground that "it is in the interest of the United States in all procurement to see that its suppliers are not over the long run increasing its costs and delaying its programs by excluding from the labor pool available minority workmen." 442 F. 2d, at 170.

[35] 42 U. S. C. §§ 2000d to 2000d–4, 2000e to 2000e–17. Significantly, the question has usually been put in terms of whether Executive Order 11246 is inconsistent with these titles of the Civil Rights Act of 1964. See, *e. g., Contractors Assn. of Eastern Pa.* v. *Secretary of Labor, supra,* at 171–174.

Title VI grants federal agencies that are "empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract," the authority to promulgate rules "which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken." Such rules must be approved by the President, and their enforcement is subject to congressional review. "In the case of any action terminating, or refusing to

[*Footnote 36 is on p. 306*]

ments in the exercise of its procurement authority.[37] The pertinent inquiry is whether under any of the arguable *statutory* grants of authority the OFCCP disclosure regulations relied on by the respondents are reasonably within the contemplation of that grant of authority. We think that it is clear that when it enacted these statutes, Congress was not concerned with public disclosure of trade secrets or confidential business information, and, unless we were to hold that any federal statute that implies some authority to collect information must grant *legislative* authority to disclose that information to the public, it is simply not possible to find in these statutes a delegation of the disclosure authority asserted by the respondents here.[38]

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grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action." § 602 of the Civil Rights Act of 1964, 78 Stat. 252, 42 U. S. C. § 2000d–1. Executive Order 11246 contains no provision for congressional review, and therefore is not promulgated pursuant to § 602. Cf. Exec. Order No. 11247, 3 CFR 348 (1964–1965 Comp.). Titles VI and VII contain no other express substantive delegation to the President.

[36] This is an argument that Congress ratified Executive Order 11246 as amended, when it rejected a series of amendments to the Equal Employment Opportunity Act that were designed to cut back on affirmative-action efforts under the Executive Order.

[37] See *Farkas* v. *Texas Instrument, Inc., supra; Farmer* v. *Philadelphia Electric Co., supra;* cf. *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113 (1940); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 637 (1952) (Jackson, J., concurring).

[38] The respondents cite *Jones* v. *Rath Packing Co.*, 430 U. S. 519, 536 (1977), for the proposition that "it has long been acknowledged that administrative regulations consistent with the agencies' substantive statutes have the force and effect of law." Brief for Respondents 38, and n. 24. The legislative delegation in that case, however, was quite explicit. The issue was whether state regulation of the labeling of meats and flour was pre-empted by the Federal Meat Inspection Act (FMIA), the Federal

The relationship between any grant of legislative authority and the disclosure regulations becomes more remote when one examines § 201 of the Executive Order. It speaks in terms of rules and regulations "necessary and appropriate" to achieve the purposes of the Executive Order. Those purposes are an end to discrimination in employment by the Federal Government and those who deal with the Federal Government. One cannot readily pull from the logic and purposes of the Executive Order any concern with the public's access to information in Government files or the importance of protecting trade secrets or confidential business statistics.

The "purpose and scope" section of the disclosure regulations indicates two underlying rationales: OFCCP's general policy "to disclose information to the public," and its policy "to cooperate with other public agencies as well as private parties seeking to eliminate discrimination in employment." 41 CFR § 60–40.1 (1978). The respondents argue that "[t]he purpose of the Executive Order is to combat discrimination in employment, and a disclosure policy designed to further this purpose is consistent with the Executive Order and an appropriate subject for regulation under its aegis." Brief for Respondents 48. Were a grant of legislative authority as a basis for Executive Order 11246 more clearly identifiable, we might agree with the respondents that this "compatibility" gives the disclosure regulations the necessary legislative force. But the thread between these regulations and any grant of

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Food, Drug, and Cosmetic Act (FDCA), and the Fair Packaging and Labeling Act. The FMIA provides that meat or a meat product is misbranded

"(5) if in a package or other container unless it bears a label showing . . . (B) an accurate statement of the quantity of the contents in terms of weight, measure, or numerical count: *Provided*, That . . . reasonable variations may be permitted, and exemptions as to small packages may be established, by regulations prescribed by the Secretary." § 1 (n)(5) of the FMIA, 21 U. S. C. § 601 (n)(5).

There is a similar provision in the FDCA.

authority by the Congress is so strained that it would do violence to established principles of separation of powers to denominate these particular regulations "legislative" and credit them with the "binding effect of law."

This is not to say that any grant of legislative authority to a federal agency by Congress must be specific before regulations promulgated pursuant to it can be binding on courts in a manner akin to statutes. What is important is that the reviewing court reasonably be able to conclude that the grant of authority contemplates the regulations issued. Possibly the best illustration remains Mr. Justice Frankfurter's opinion for the Court in *National Broadcasting Co.* v. *United States*, 319 U. S. 190 (1943). There the Court rejected the argument that the Communications Act of 1934 did not give the Federal Communications Commission authority to issue regulations governing chain broadcasting beyond the specification of technical, engineering requirements. Before reaching that conclusion, however, the Court probed the language and logic of the Communications Act and its legislative history. Only after this careful parsing of authority did the Court find that the regulations had the force of law and were binding on the courts unless they were arbitrary or not promulgated pursuant to prescribed procedures.

> "Our duty is at an end when we find that the action of the Commission was based upon findings supported by evidence, and was made pursuant to authority granted by Congress. It is not for us to say that the 'public interest' will be furthered or retarded by the Chain Broadcasting Regulations. The responsibility belongs to the Congress for the grant of valid legislative authority and to the Commission for its exercise." *Id.*, at 224.

The respondents argue, however, that even if these regulations do not have the force of law by virtue of Executive Order 11246, an explicit grant of legislative authority for such

regulations can be found in 5 U. S. C. § 301, commonly referred to as the "housekeeping statute." [39] It provides:

> "The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public."

The antecedents of § 301 go back to the beginning of the Republic, when statutes were enacted to give heads of early Government departments authority to govern internal departmental affairs. Those laws were consolidated into one statute in 1874 and the current version of the statute was enacted in 1958.

Given this long and relatively uncontroversial history, and the terms of the statute itself, it seems to be simply a grant of authority to the agency to regulate its own affairs. What is clear from the legislative history of the 1958 amendment to § 301 is that this section was not intended to provide authority for limiting the scope of § 1905.[40]

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[39] See H. R. Rep. No. 1461, 85th Cong., 2d Sess., 1 (1958):

"The law has been called an office 'housekeeping' statute, enacted to help General Washington get his administration underway by spelling out the authority for executive officials to set up offices and file Government documents. The documents involved are papers pertaining to the day-to-day business of Government which are not restricted under other specific laws nor classified as military information or secrets of state."

The Secretary of Labor did not cite this statute as authority for the OFCCP disclosure regulations. 38 Fed. Reg. 3192–3193 (1973).

[40] This does not mean, of course, that disclosure regulations promulgated on the basis of § 301 are "in excess of statutory jurisdiction, authority, or limitations" for purposes of the APA, 5 U. S. C. § 706 (2)(C). It simply means that disclosure pursuant to them is not "authorized by law" within the meaning of § 1905.

The 1958 amendment to § 301 was the product of congressional concern that agencies were invoking § 301 as a source of authority to withhold information from the public. Congressman Moss sponsored an amendment that added the last sentence to § 301, which specifically states that this section "does not authorize withholding information from the public." The Senate Report accompanying the amendment stated:

> "Nothing in the legislative history of [§ 301] shows that Congress intended this statute to be a grant of authority to the heads of the executive departments to withhold information from the public or to limit the availability of records to the public." S. Rep. No. 1621, 85th Cong., 2d Sess., 2 (1958).

The logical corollary to this observation is that there is nothing in the legislative history of § 301 to indicate it is a substantive grant of legislative power to promulgate rules authorizing the *release* of trade secrets or confidential business information. It is indeed a "housekeeping statute," authorizing what the APA terms "rules of agency organization, procedure or practice" as opposed to "substantive rules." [41]

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[41] The House Committee on Government Operations cited approvingly an observation by legal experts that

"[§ 301] merely gives department heads authority to regulate within their departments the way in which requests for information are to be dealt with—for example, by centralizing the authority to deal with such requests in the department head." H. R. Rep. No. 1461, 85th Cong., 2d Sess., 7 (1958).

It noted that the members of its Special Subcommittee on Government Information

"unanimously agreed that [§ 301] originally was adopted in 1789 to provide for the day-to-day office housekeeping in the Government departments, but through misuse it has become twisted into a claim of authority to withhold information." *Id.*, at 12.

There are numerous remarks to similar effect in the Senate Report and the floor debates. See, *e. g.*, S. Rep. No. 1621, 85th Cong., 2d Sess., 2 (1958); 104 Cong. Rec. 6549 (Rep. Moss), 6560 (Rep. Fascell), 15690–15696 (colloquy between Sens. Hruska and Johnston) (1958).

This would suggest that regulations pursuant to § 301 could not provide the "authoriz[ation] by law" required by § 1905. But there is more specific support for this position. During the debates on the 1958 amendment Congressman Moss assured the House that the amendment would "not affect the confidential status of information given to the Government and carefully detailed in title 18, United States Code, section 1905." 104 Cong. Rec. 6550 (1958).

The respondents argue that this last statement is of little significance, because it is only made with reference to the amendment. But that robs Congressman Moss' statement of any substantive import. If Congressman Moss thought that records within the terms of § 1905 could be released on the authority of a § 301 regulation, why was he (and presumably the House) concerned with whether the amendment affected § 1905? Under the respondents' interpretation, records released pursuant to § 301 are outside § 1905 by virtue of the first sentence of § 301.

The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history. Congressman Moss' statement must be considered with the Reports of both Houses and the statements of other Congressmen, all of which refute the respondents' interpretation of the relationship between § 301 and § 1905.[42] Of greatest significance, however,

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[42] Throughout the floor debates references are made to 78 statutes that require the withholding of information, and assurances are consistently given that these statutes are not in any way affected by § 301. *E. g.*, 104 Cong. Rec. 6548 (Rep. Brown), 6549–6550 (Rep. Moss) (1958). It is clear from Congressman Moss' comments that § 1905 is one of those statutes. 104 Cong. Rec. 6549–6550 (1958). There is also frequent reference to trade secrets as not being disclosable and the confidentiality of that information as not being affected by § 301. H. R. Rep. No. 1461, 85th Cong., 2d Sess., 2 (1958); 104 Cong. Rec. 6558 (Rep. Fascell), 6564 (Rep. Wright) (1958). The following exchange between Congressmen Meader and Moss is also instructive.

"Mr. MEADER. Mr. Chairman, I should like the attention of the gentleman from California [Mr. Moss], the sponsor of the measure. I

is the "housekeeping" nature of § 301 itself. On the basis of this evidence of legislative intent, we agree with the Court of Appeals for the District of Columbia Circuit that "[s]ection 301 does not authorize regulations limiting the scope of section 1905." *Charles River Park "A," Inc.* v. *Department of HUD*, 171 U. S. App. D. C. 286, 293–294, 519 F. 2d 935, 942–943 (1975).

There is also a procedural defect in the OFCCP disclosure regulations which precludes courts from affording them the force and effect of law. That defect is a lack of strict compliance with the APA. Recently we have had occasion to examine the requirements of the APA in the context of "legislative" or "substantive" rulemaking. In *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U. S. 519 (1978), we held that courts could only in "extraordinary circumstances" impose procedural requirements on an agency beyond those specified in the APA. It is within

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would like to read three paragraphs from the additional views I submitted to the report which appear upon page 62 of the report. I said:

"I believe there is unanimous sentiment in the Government Operations Committee on the following points:

"1. That departments and agencies of the Government have construed [§ 301] to authorize them to withhold information from the public and to limit the availability of records to the public.

"2. That this interpretation is a strained and erroneous interpretation of the intent of Congress in [§ 301] which merely authorized department heads to make regulations governing day-to-day operation of the department—a so-called housekeeping function; and that [§ 301] was not intended to deal with the authority to *release* or withhold information or records.

. . . . .

"I now yield to the gentleman from California to state whether or not those three points as I have set them forth in my additional views in the report on this measure accurately state what he understands to be the consensus of the judgment of the members of the Government Operations Committee in reporting out this legislation?

"MR. MOSS. That is correct as I interpret it." *Id.*, at 6562 (emphasis added).

an agency's discretion to afford parties more procedure, but it is not the province of the courts to do so. In *Vermont Yankee,* we recognized that the APA is "'a formula upon which opposing social and political forces have come to rest.'" *Id.,* at 547 (quoting *Wong Yang Sung* v. *McGrath,* 339 U. S. 33, 40 (1950)). Courts upset that balance when they override informed choice of procedures and impose obligations not required by the APA. By the same token, courts are charged with maintaining the balance: ensuring that agencies comply with the "outline of minimum essential rights and procedures" set out in the APA. H. R. Rep. No. 1980, 79th Cong., 2d Sess., 16 (1946); see *Vermont Yankee Nuclear Power Corp., supra,* at 549 n. 21. Certainly regulations subject to the APA cannot be afforded the "force and effect of law" if not promulgated pursuant to the statutory procedural minimum found in that Act.[43]

Section 4 of the APA, 5 U. S. C. § 553, specifies that an agency shall afford interested persons general notice of proposed rulemaking and an opportunity to comment before a substantive rule is promulgated.[44] "Interpretive rules, general

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[43] See, *e. g., Morton* v. *Ruiz,* 415 U. S. 199 (1974); *United States* v. *Allegheny-Ludlum Steel Corp.,* 406 U. S. 742, 758 (1972).

[44] 5 U. S. C. § 553:

"(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

"(1) a military or foreign affairs function of the United States; or

"(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

"(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

"(1) a statement of the time, place, and nature of public rule making proceedings;

"(2) reference to the legal authority under which the rule is proposed; and

statements of policy or rules of agency organization, procedure or practice" are exempt from these requirements. When the Secretary of Labor published the regulations pertinent in this case, he stated:

> "As the changes made by this document relate solely to interpretive rules, general statements of policy, and to rules of agency procedure and practice, neither notice of proposed rule making nor public participation therein is required by 5 U. S. C. 553. Since the changes made by this document either relieve restrictions or are interpretative rules, no delay in effective date is required by 5

"(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

"Except when notice or hearing is required by statute, this subsection does not apply—

"(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

"(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

"(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

"(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

"(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

"(2) interpretative rules and statements of policy; or

"(3) as otherwise provided by the agency for good cause found and published with the rule.

"(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."

> U. S. C. 553 (d). These rules shall therefore be effective immediately.
>
> "In accordance with the spirit of the public policy set forth in 5 U. S. C. 553, interested persons may submit written comments, suggestions, data, or arguments to the Director, Office of Federal Contract Compliance . . . ." 38 Fed. Reg. 3193 (1973).

Thus, the regulations were essentially treated as interpretative rules and interested parties were not afforded the notice of proposed rulemaking required for substantive rules under 5 U. S. C. § 553 (b). As we observed in *Batterton* v. *Francis*, 432 U. S., at 425 n. 9: "[A] court is not required to give effect to an interpretative regulation. Varying degrees of deference are accorded to administrative interpretations, based on such factors as the timing and consistency of the agency's position, and the nature of its expertise." We need not decide whether these regulations are properly characterized as "interpretative rules." It is enough that such regulations are not properly promulgated as substantive rules, and therefore not the product of procedures which Congress prescribed as necessary prerequisites to giving a regulation the binding effect of law.[45] An interpretative regulation or general state-

[45] The regulations at issue in *Jones* v. *Rath Packing Co.*, see n. 38, *supra*, were the product of notice of proposed rulemaking and comment. 32 Fed. Reg. 10729 (1967); 35 Fed. Reg. 15552 (1970).

We also note that the respondents' reliance on *FCC* v. *Schreiber*, 381 U. S. 279 (1965), is misplaced. In that case the Court held that a FCC rule—that investigatory proceedings would be public unless a hearing examiner found that "the public interest, the proper dispatch of the business . . . , or the ends of justice" would be served by closed sessions—was consistent with the pertinent congressional grant of authority and not arbitrary or unreasonable. This Court held that the District Court impermissibly invaded the province of the agency when it imposed its own notions of proper procedures. Cf. *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U. S. 519 (1978). There was no question in the case regarding the applicability of § 1905. Moreover, the respondents had made a broad request that "*all* testimony and

ment of agency policy cannot be the "authoriz[ation] by law" required by § 1905.

This disposition best comports with both the purposes underlying the APA and sound administrative practice. Here important interests are in conflict: the public's access to information in the Government's files and concerns about personal privacy and business confidentiality. The OFCCP's regulations attempt to strike a balance. In enacting the APA, Congress made a judgment that notions of fairness and informed administrative decisionmaking require that agency decisions be made only after affording interested persons notice and an opportunity to comment. With the consideration that is the necessary and intended consequence of such procedures, OFCCP might have decided that a different accommodation was more appropriate.

B

We reject, however, Chrysler's contention that the Trade Secrets Act affords a private right of action to enjoin disclosure in violation of the statute. In *Cort* v. *Ash*, 422 U. S. 66 (1975), we noted that this Court has rarely implied a private right of action under a criminal statute, and where it has done so "there was at least a statutory basis for inferring that a civil cause of action of some sort lay in favor of someone." [46] Nothing in § 1905 prompts such an inference. Nor are other pertinent circumstances outlined in *Cort* present here. As our review of the legislative history of § 1905—or

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documents to be elicited from them . . . should be received *in camera*." 381 U. S., at 295 (emphasis in original). The Court held that when specific information was requested that might actually injure Schreiber's firm competitively, "there would be ample opportunity to request that it be received in confidence, and to seek judicial protection if the request were denied." *Id.*, at 296.

[46] 422 U. S., at 79, citing *Wyandotte Transportation Co.* v. *United States*, 389 U. S. 191 (1967); *J. I. Case Co.* v. *Borak*, 377 U. S. 426 (1964); *Texas & Pacific R. Co.* v. *Rigsby*, 241 U. S. 33 (1916).

lack of same—might suggest, there is no indication of legislative intent to create a private right of action. Most importantly, a private right of action under § 1905 is not "necessary to make effective the congressional purpose," *J. I. Case Co.* v. *Borak,* 377 U. S. 426, 433 (1964), for we find that review of DLA's decision to disclose Chrysler's employment data is available under the APA.[47]

IV

While Chrysler may not avail itself of any violations of the provisions of § 1905 in a separate cause of action, any such violations may have a dispositive effect on the outcome of judicial review of agency action pursuant to § 10 of the APA. Section 10 (a) of the APA provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action . . . , is entitled to judicial review thereof." 5 U. S. C. § 702. Two exceptions to this general rule of reviewability are set out in § 10. Review is not available where "statutes preclude judicial review" or where "agency action is committed to agency discretion by law." 5 U. S. C. §§ 701 (a)(1), (2). In *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U. S. 402, 410 (1971), the Court held that the latter exception applies "where 'statutes are drawn in such broad terms that in a given case there is no law to apply,' " quoting S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945). Were we simply confronted with the authorization in 5 U. S. C. § 301 to prescribe regulations regarding "the custody, use, and preservation of [agency] records, papers, and property," it would be difficult to derive any standards limiting agency conduct which might constitute "law to apply." But our discussion in Part III demonstrates

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[47] Jurisdiction to review agency action under the APA is found in 28 U. S. C. § 1331. See *Califano* v. *Sanders,* 430 U. S. 99 (1977).

Chrysler does not argue in this Court, as it did below, that private rights of action are available under 42 U. S. C. § 2000e–8 (e) and 44 U. S. C. § 3508.

that § 1905 and any "authoriz[ation] by law" contemplated by that section place substantive limits on agency action.[48] Therefore, we conclude that DLA's decision to disclose the Chrysler reports is reviewable agency action and Chrysler is a person "adversely affected or aggrieved" within the meaning of § 10 (a).

Both Chrysler and the respondents agree that there is APA review of DLA's decision. They disagree on the proper scope of review. Chrysler argues that there should be *de novo* review, while the respondents contend that such review is only available in extraordinary cases and this is not such a case.

The pertinent provisions of § 10 (e) of the APA, 5 U. S. C. § 706, state that a reviewing court shall

> "(2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> . . . . .
>
> "(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court."

For the reasons previously stated, we believe any disclosure that violates § 1905 is "not in accordance with law" within the meaning of 5 U. S. C. § 706 (2)(A). *De novo* review by the District Court is ordinarily not necessary to decide whether a contemplated disclosure runs afoul of § 1905. The District Court in this case concluded that disclosure of some of Chrysler's documents was barred by § 1905, but the Court of Appeals did not reach the issue. We shall therefore vacate the Court of Appeals' judgment and remand for further proceedings consistent with this opinion in order that the Court

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[48] By regulation, the Secretary of Labor also has imposed the standards of § 1905 on OFCCP and its compliance agencies. 29 CFR § 70.21 (1978).

of Appeals may consider whether the contemplated disclosures would violate the prohibition of § 1905.[49] Since the decision regarding this substantive issue—the scope of § 1905—will necessarily have some effect on the proper form of judicial review pursuant to § 706 (2), we think it unnecessary, and therefore unwise, at the present stage of this case for us to express any additional views on that issue.

Vacated and remanded.

MR. JUSTICE MARSHALL, concurring.

I agree that respondents' proposed disclosure of information is not "authorized by law" within the meaning of 18 U. S. C. § 1905, and I therefore join the opinion of the Court. Because the number and complexity of the issues presented by this case will inevitably tend to obscure the dispositive conclusions, I wish to emphasize the essential basis for the decision today.

This case does not require us to determine whether, absent a congressional directive, federal agencies may reveal information obtained during the exercise of their functions. For whatever inherent power an agency has in this regard, § 1905 forbids agencies from divulging certain types of information unless disclosure is independently "authorized by law." Thus, the controlling issue in this case is whether the OFCCP dis-

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[49] Since the Court of Appeals assumed for purposes of argument that the material in question was within an exemption to the FOIA, that court found it unnecessary expressly to decide that issue and it is open on remand. We, of course, do not here attempt to determine the relative ambits of Exemption 4 and § 1905, or to determine whether § 1905 is an exempting statute within the terms of the amended Exemption 3, 5 U. S. C. § 522 (b) (3). Although there is a theoretical possibility that material might be outside Exemption 4 yet within the substantive provisions of § 1905, and that therefore the FOIA might provide the necessary "author-iz[ation] by law" for purposes of § 1905, that possibility is at most of limited practical significance in view of the similarity of language between Exemption 4 and the substantive provisions of § 1905.

closure regulations, 41 CFR §§ 60.40–1 to 60.40–4 (1978), provide the requisite degree of authorization for the agency's proposed release. The Court holds that they do not, because the regulations are not sanctioned directly or indirectly by federal legislation.[1] In imposing the authorization requirement of § 1905, Congress obviously meant to allow only those disclosures contemplated by congressional action. *Ante,* at 298–312. Otherwise, the agencies Congress intended to control could create their own exceptions to § 1905 simply by promulgating valid disclosure regulations. Finally, the Court holds that since § 10 (e) of the Administrative Procedure Act requires agency action to be "in accordance with law," 5 U. S. C. § 706 (2)(A), a reviewing court can prevent any disclosure that would violate § 1905.[2]

Our conclusion that disclosure pursuant to the OFCCP regulations is not "authorized by law" for purposes of § 1905, however, does not mean *the regulations themselves* are "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right" for purposes of the Administrative Procedure Act. 5 U. S. C. § 706 (2)(C). As the Court recognizes, *ante,* at 309 n. 40, that inquiry involves very different considerations than those presented in the instant case. Accordingly, we do not question the general validity of these OFCCP regulations or any other regulations promulgated under § 201 of Executive Order No. 11246, 3 CFR 340 (1964–1965 Comp.). Nor do we consider whether such an Executive Order must be founded on a legislative enactment. The

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[1] That the OFCCP regulations were not promulgated in strict compliance with the Administrative Procedure Act, *ante,* at 312–316, is an independent reason why those regulations do not satisfy the requirements of § 1905, although the agency could rectify this shortcoming.

[2] Thus, the courts below must determine on remand whether § 1905 covers the types of information respondents intended to disclose. Disclosure of those documents not covered by § 1905 would, under the Court's holding, be "in accordance with law." 5 U. S. C. § 706 (2)(A).

Court's holding is only that the OFCCP regulations in issue here do not "authorize" disclosure within the meaning of § 1905.

Based on this understanding, I join the opinion of the Court.

HUGHES *v.* OKLAHOMA

APPEAL FROM THE COURT OF CRIMINAL APPEALS OF OKLAHOMA

No. 77-1439. Argued January 9, 1979—Decided April 24, 1979

An Oklahoma statute prohibits transporting or shipping outside the State for sale natural minnows seined or procured from waters within the State. Appellant, who holds a Texas license to operate a commercial minnow business in Texas, was charged with violating the Oklahoma statute by transporting from Oklahoma to Texas a load of natural minnows purchased from a minnow dealer licensed to do business in Oklahoma. Appellant's defense that the Oklahoma statute was unconstitutional because it was repugnant to the Commerce Clause was rejected, and he was convicted and fined. The Oklahoma Court of Criminal Appeals affirmed, relying on *Geer* v. *Connecticut*, 161 U. S. 519, which had sustained against a Commerce Clause challenge a Connecticut statute forbidding the transportation beyond the State of game birds that had been lawfully killed within the State. The *Geer* decision rested on the holding that no interstate commerce was involved, because the State had the power, as representative for its citizens, who "owned" in common all wild animals within the State, to control the "ownership" of game that had been lawfully reduced to possession, and had exercised its power by prohibiting its removal from the State.

Held: The Oklahoma statute is repugnant to the Commerce Clause. Pp. 325–339.

(a) *Geer* v. *Connecticut, supra,* is overruled. Time has revealed the error of the result reached in *Geer* through its application of the 19th-century legal fiction of state ownership of wild animals. Challenges under the Commerce Clause to state regulations of wild animals should be considered according to the same general rule applied to state regulations of other natural resources. Pp. 326–335.

(b) Under that general rule, this Court must inquire whether the challenged statute regulates evenhandedly with only "incidental" effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect; whether the statute serves a legitimate local purpose; and, if so, whether alternative means could promote this local purpose as well without discriminating against interstate commerce. P. 336.

(c) The Oklahoma statute on its face discriminates against interstate

commerce by forbidding the transportation of natural minnows out of the State for purposes of sale and thus overtly blocking the flow of interstate commerce at the State's border. The statute is not a "last ditch" attempt at conservation after nondiscriminatory alternatives have proved unfeasible. It is rather a choice of the most discriminatory means even though nondiscriminatory alternatives would seem likely to fulfill the State's purported legitimate local purpose of conservation more effectively. Pp. 336–338.

(d) States may promote the legitimate purpose of protecting and conserving wild animal life within their borders only in ways consistent with the basic principle that the pertinent economic unit is the Nation; and when a wild animal becomes an article of commerce, its use cannot be limited to the citizens of one State to the exclusion of citizens of another State. Pp. 338–339.

572 P. 2d 573, reversed.

BRENNAN, J., delivered the opinion of the Court, in which STEWART, WHITE, MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., joined, *post*, p. 339.

Robert M. Helton argued the cause and filed a brief for appellant.

Bill J. Bruce argued the cause for appellee. With him on the brief was *Larry Derryberry*, Attorney General of Oklahoma.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question presented for decision is whether Okla. Stat., Tit. 29, § 4–115 (B) (Supp. 1978), violates the Commerce Clause, Art. I, § 8, cl. 3, of the United States Constitution, insofar as it provides that "[n]o person may transport or ship minnows for sale outside the state which were seined or procured within the waters of this state . . . ." [1]

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[1] Section 4–115 provides in full:

"A. No person may ship or transport minnows for sale into this state from an outside source without having first procured a license for such from the Director.

"B. No person may transport or ship minnows for sale outside the state

Appellant William Hughes holds a Texas license to operate a commercial minnow business near Wichita Falls, Tex. An Oklahoma game ranger arrested him on a charge of violating § 4–115 (B) by transporting from Oklahoma to Wichita Falls a load of natural minnows purchased from a minnow dealer licensed to do business in Oklahoma. Hughes' defense that § 4–115 (B) was unconstitutional because it was repugnant to the Commerce Clause was rejected, and he was convicted and fined. The Oklahoma Court of Criminal Appeals affirmed, stating:

> "The United States Supreme Court has held on numerous occasions that the wild animals and fish within a state's border are, so far as capable of ownership, owned by the state in its sovereign capacity for the common

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which were seined or procured within the waters of this state except that:

"1. Nothing contained herein shall prohibit any person from leaving the state possessing three (3) dozen or less minnows;

"2. Nothing contained herein shall prohibit sale and shipment of minnows raised in a regularly licensed commercial minnow hatchery.

"C. The fee for a license under this section shall be:

"1. For residents, One Hundred Dollars ($100.00);

"2. For nonresidents, Three Hundred Dollars ($300.00).

"D. Any person convicted of violating any provisions of this section shall be punished by a fine of not less than One Hundred Dollars ($100.00) nor more than Two Hundred Dollars ($200.00)."

The prohibition against transportation out of State for sale thus does not apply to hatchery-bred minnows, but only to "natural" minnows seined or procured from waters within the State.

Section 4–115 (B) is part of the Oklahoma Wildlife Conservation Code. Another provision of that Code requires that persons have a minnow dealer's license before they can lawfully seine or trap minnows within the State—except for their own use as bait—§ 4–116 (Supp. 1978), but no limit is imposed on the number of minnows a licensed dealer may take from state waters. Nor is there any regulation except § 4–115 (B) concerning the disposition of lawfully acquired minnows; they may be sold within Oklahoma to any person and for any purpose, and may be taken out of the State for any purpose except sale.

benefit of all its people. Because of such ownership, and in the exercise of its police power, the state may regulate and control the taking, subsequent use and property rights that may be acquired therein. *Lacoste* v. *Department of Conservation,* 263 U. S. 545 . . . ; *Geer* v. *State of Connecticut,* 161 U. S. 519 . . . . As stated in *Lacoste, supra,* protection of the wildlife of a state is peculiarly within the police power of the state, and the state has great latitude in determining what means are appropriate for its protection.

". . . Oklahoma law does not prohibit commercial minnow hatcheries within her borders from selling stock minnows to anyone, resident or nonresident, and minnows purchased therefrom may be freely exported. However, the law served to protect against the depletion of minnows in Oklahoma's natural streams through commercial exportation. No person is allowed to export natural minnows for sale outside of Oklahoma. Such a prohibition is not repugnant to the commerce clause . . . ." 572 P. 2d 573, 575 (1977).

We noted probable jurisdiction, 439 U. S. 815 (1978). We reverse. *Geer* v. *Connecticut,* 161 U. S. 519 (1896), on which the Court of Criminal Appeals relied, is overruled. In that circumstance, § 4–115 (B) cannot survive appellant's Commerce Clause attack.

I

The few simple words of the Commerce Clause—"The Congress shall have Power . . . To regulate Commerce . . . among the several States . . ."—reflected a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Con-

federation. See *H. P. Hood & Sons, Inc.* v. *Du Mond*, 336 U. S. 525, 533–534 (1949). The Commerce Clause has accordingly been interpreted by this Court not only as an authorization for congressional action, but also, even in the absence of a conflicting federal statute, as a restriction on permissible state regulation.[2] The cases defining the scope of permissible state regulation in areas of congressional silence reflect an often controversial evolution of rules to accommodate federal and state interests.[3] *Geer* v. *Connecticut* was decided relatively early in that evolutionary process. We hold that time has revealed the error of the early resolution reached in that case, and accordingly *Geer* is today overruled.

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[2] "The Commerce Clause is one of the most prolific sources of national power and an equally prolific source of conflict with legislation of the state. While the Constitution vests in Congress the power to regulate commerce among the states, it does not say what the states may or may not do in the absence of congressional action, nor how to draw the line between what is and what is not commerce among the states. Perhaps even more than by interpretation of its written word, this Court has advanced the solidarity and prosperity of this Nation by the meaning it has given to these great silences of the Constitution." *H. P. Hood & Sons, Inc.* v. *Du Mond*, 336 U. S., at 534–535.

Philadelphia v. *New Jersey*, 437 U. S. 617, 621–623 (1978), made clear that there is no "two-tiered definition of commerce." The definition of "commerce" is the same when relied on to strike down or restrict state legislation as when relied on to support some exertion of federal control or regulation.

[3] See, *e. g.*, *Gibbons* v. *Ogden*, 9 Wheat. 1, 209 (1824); *Willson* v. *Black Bird Creek Marsh Co.*, 2 Pet. 245 (1829); *Cooley* v. *Board of Wardens*, 12 How. 299 (1852); *Port Richmond & Bergen Point Ferry Co.* v. *Board of Chosen Freeholders*, 234 U. S. 317 (1914); *Di Santo* v. *Pennsylvania*, 273 U. S. 34 (1927); *Parker* v. *Brown*, 317 U. S. 341 (1943); *Southern Pacific Co.* v. *Arizona ex rel. Sullivan*, 325 U. S. 761 (1945); *H. P. Hood & Sons, Inc.* v. *Du Mond, supra; Pike* v. *Bruce Church, Inc.*, 397 U. S. 137 (1970). See generally, F. Frankfurter, The Commerce Clause Under Marshall, Taney and Waite (1937); Dowling, Interstate Commerce and State Power, 27 Va. L. Rev. 1 (1940); Dowling, Interstate Commerce and State Power—Revised Version, 47 Colum. L. Rev. 547 (1947).

A

Geer sustained against a Commerce Clause challenge a statute forbidding the transportation beyond the State of game birds that had been lawfully killed within the State.[4] The decision rested on the holding that no interstate commerce was involved. This conclusion followed in turn from the view that the State had the power, as representative for its citizens, who "owned" in common all wild animals within the State, to control not only the *taking* of game but also the *ownership* of game that had been lawfully reduced to possession.[5] By virtue of this power, Connecticut could qualify the ownership of wild game taken within the State by, for example, prohibiting its removal from the State: "The common ownership imports the right to keep the property, if the sovereign so chooses, always within its jurisdiction for every purpose." 161 U. S., at 530. Accordingly, the State's power to qualify ownership raised serious doubts whether the sale or exchange of wild game constituted "commerce" at all; in any event the Court held that the qualification imposed by the challenged statute removed any transactions involving wild game killed in Connecticut from *interstate* commerce.[6]

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[4] "[T]he sole issue which the case presents is, was it lawful under the Constitution of the United States (section 8, Article I) for the State of Connecticut to allow the killing of birds within the State during a designated open season, to allow such birds, when so killed, to be used, to be sold and to be bought for use within the State, and yet to forbid their transportation beyond the State? Or, to state it otherwise, had the State of Connecticut the power to regulate the killing of game within her borders so as to confine its use to the limits of the State and forbid its transmission outside of the State?" 161 U. S., at 522.

[5] *Id.*, at 522–529. The Court has recognized that *Geer*'s analysis of the authorities on this issue is open to question. *Toomer* v. *Witsell*, 334 U. S. 385, 402 n. 37 (1948).

[6] "The qualification which forbids [the game's] removal from the State necessarily entered into and formed part of every transaction on the subject, and deprived the mere sale or exchange of these articles of that element of freedom of contract and of full ownership which is an essential

Mr. Justice Field and the first Mr. Justice Harlan dissented, rejecting as artificial and formalistic the Court's analysis of "ownership" and "commerce" in wild game. They would have affirmed the State's power to provide for the protection of wild game, but only "so far as such protection . . . does not contravene the power of Congress in the regulation of inter-

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attribute of commerce. Passing, however, as we do, the decision of this question, and granting that the dealing in game killed within the State, under the provision in question, created internal State commerce, it does not follow that such internal commerce became necessarily the subject-matter of interstate commerce, and therefore under the control of the Constitution of the United States.

. . . . . .

". . . The power of the State to control the killing of and ownership in game being admitted, the commerce in game, which the state law permitted, was necessarily only internal commerce, since the restriction that it should not become the subject of external commerce went along with the grant and was a part of it." 161 U. S., at 530–532.

Our Brother REHNQUIST suggests that the Court in *Geer* offered as an "alternative basis for its decision" (in the final paragraph of its 15-page opinion) that the "State, in the exercise of its police power, could act to preserve for its people a valuable food supply, even though interstate commerce was remotely and indirectly affected." *Post*, at 340 n. 3. That this was not an "alternative basis," however, is made clear in a sentence not quoted by our Brother REHNQUIST:

"The power of a State to protect by adequate police regulation its people against the adulteration of articles of food, . . . although in doing so commerce might be remotely affected, necessarily carries with it the existence of a like power to preserve a food supply *which belongs in common to all the people of the State, which can only become the subject of ownership in a qualified way, and which can never be the object of commerce except with the consent of the State and subject to the conditions which it may deem best to impose for the public good.*" 161 U. S., at 535 (emphasis added).

Thus, rather than an "alternative basis" independent of the "state ownership" and "no interstate commerce" rationales, this "preservation of a valuable resource" rationale was premised on those rationales. In any event, even if an "alternative basis," this rationale has met the same fate as *Geer*'s primary rationale. See *infra*, at 329–331, and n. 9.

state commerce." [7] Their view was that "[w]hen any animal . . . is lawfully killed for the purposes of food or other uses of man, it becomes an article of commerce, and its use cannot be limited to the citizens of one State to the exclusion of citizens of another State." [8]

B

The view of the *Geer* dissenters increasingly prevailed in subsequent cases. Indeed, not only has the *Geer* analysis been rejected when natural resources other than wild game were involved, but even state regulations of wild game have been held subject to the strictures of the Commerce Clause under the pretext of distinctions from *Geer*.

The erosion of *Geer* began only 15 years after it was decided. A Commerce Clause challenge was addressed to an Oklahoma statute designed to prohibit the transportation beyond the State of natural gas produced by wells within the State. *West* v. *Kansas Natural Gas Co.*, 221 U. S. 229 (1911). Based on reasoning parallel to that in *Geer*, Oklahoma urged its right to "conserve" the gas for the use of its own citizens, stressing the limited supply and the absence of alternative sources of fuel within the State. Nevertheless, the Court, in a passage reminiscent of the dissents in *Geer*, condemned the obvious protectionist motive in the Oklahoma statute and rejected the State's arguments with a powerful reaffirmation of the vision of the Framers:

> "The statute of Oklahoma recognizes [gas] to be a subject of intrastate commerce, but seeks to prohibit it from being the subject of interstate commerce, and this is the purpose of its conservation. . . . If the States have such power a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining

[7] 161 U. S., at 541 (Field, J., dissenting); see *id.*, at 543 (Harlan, J., dissenting).

[8] *Id.*, at 538, 541–542 (Field, J., dissenting); see *id.*, at 543–544 (Harlan, J., dissenting).

> States their minerals. And why may not the products of the field be brought within the principle? Thus enlarged, or without that enlargement, its influence on interstate commerce need not be pointed out. To what consequences does such power tend? If one State has it, all States have it; embargo may be retaliated by embargo, and commerce will be halted at state lines. And yet we have said that 'in matters of foreign and interstate commerce there are no state lines.' In such commerce, instead of the States, a new power appears and a new welfare, a welfare which transcends that of any State. But rather let us say it is constituted of the welfare of all of the States and that of each State is made the greater by a division of its resources, natural and created, with every other State, and those of every other State with it. This was the purpose, as it is the result, of the interstate commerce clause of the Constitution of the United States. If there is to be a turning backward it must be done by the authority of another instrumentality than a court." 221 U. S., at 255–256.

The Court distinguished discriminatory or prohibatory regulations offensive to the Commerce Clause, such as the Oklahoma statute, from a valid "exercise of the police power to regulate the taking of natural gas" that was "universal in its application and justified by the nature of the gas and which allowed its transportation to other states." *Id.*, at 257; see *id.*, at 252–254 (distinguishing *Ohio Oil Co.* v. *Indiana*, 177 U. S. 190 (1900)).

In subsequent Commerce Clause challenges to state regulation of exports of natural resources, the *West* analysis emerged as the dominant approach. See, *e. g.*, *Pennsylvania* v. *West Virginia*, 262 U. S. 553, 598–600 (1923);[9] *H. P. Hood & Sons*,

[9] The inconsistency between the result in this case and that in *Geer* was not overlooked by the dissenting Justices. See *Pennsylvania* v. *West Virginia*, 262 U. S., at 601 (Holmes, J., dissenting). Significantly,

Inc. v. *Du Mond,* 336 U. S. 525 (1949). Today's principle is that stated in *Pike* v. *Bruce Church, Inc.,* 397 U. S. 137, 142 (1970):

> "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." (Citations omitted.)

This formulation was employed only last Term to strike down New Jersey's attempt to "conserve" the natural resource of landfill areas within the State for the disposal of waste generated within the State. *Philadelphia* v. *New Jersey,* 437 U. S. 617, 624 (1978).

The *Geer* analysis has also been eroded to the point of virtual extinction in cases involving regulation of wild animals. The first challenge to *Geer*'s theory of a State's power over wild animals came in *Missouri* v. *Holland,* 252 U. S. 416 (1920). The State of Missouri, relying on the theory of state ownership of wild animals, attacked the Migratory Bird Treaty Act on the ground that it interfered with the State's control over wild animals within its boundaries. Writing for the Court, Mr. Justice Holmes upheld the Act as a proper

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our Brother REHNQUIST relies on this *dissent* in his discussion of the "alternative basis" of *Geer*—the "preservation of a valuable natural resource" rationale. See n. 6, *supra; post,* at 340–341, n. 3. The *Court* opinion in *Pennsylvania* v. *West Virginia,* like that in *West,* expressly rejected this argument along with the "no interstate commerce" rationale. 262 U. S., at 599–600.

exercise of the treatymaking power. He commented in passing on the artificiality of the *Geer* rationale: "To put the claim of the State upon title is to lean upon a slender reed." 252 U. S., at 434.

Foster-Fountain Packing Co. v. *Haydel*, 278 U. S. 1 (1928), undermined *Geer* even more directly. A Louisiana statute forbade the transportation beyond the State of shrimp taken in Louisiana waters until the heads and shells had been removed.[10] The statute clearly relied on the *Geer* state-control-of-ownership rationale.[11] Anyone lawfully taking shrimp from Louisiana waters was granted "a qualified interest which may be sold within the State." Only after the head and shell

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[10] The law challenged in *Foster-Fountain Packing Co.* was passed in July 1926. The state legislature may have been encouraged to take such action by certain language in *Lacoste* v. *Louisiana Dept. of Conservation*, 263 U. S. 545 (1924), language also relied on by the Oklahoma Court of Criminal Appeals in this case. *Lacoste* upheld a Louisiana "severance" tax on the skins of all wild furbearing animals and alligators taken in the State. The Court cited *Geer* for the proposition that:

"The wild animals within its borders are, so far as capable of ownership, owned by the State in its sovereign capacity for the common benefit of all of its people. Because of such ownership, and in the exercise of its police power the State may regulate and control the taking, subsequent use and property rights that may be acquired therein." 263 U. S., at 549.

Nevertheless, *Lacoste* expressly declined to uphold the tax "by virtue of the power of the State to prohibit, and therefore to condition, the removal of wild game from the State." *Ibid.* Rather than reach this issue, the Court upheld the measure as a valid police regulation designed to conserve and protect wild animals, noting that the tax applied to all skins taken within the State, whether kept within the State or shipped out. *Id.*, at 550–551. Thus, despite its citation of *Geer*, *Lacoste* is actually more compatible with the cases following the views of the Justices dissenting in *Geer*.

[11] The preamble to the Act read in part as follows: "To declare all shrimp and parts thereof in the waters of the State to be the property of the State of Louisiana, and to provide the manner and extent of their reduction to private ownership . . . ." *Foster-Fountain Packing Co.* v. *Haydel*, 278 U. S., at 5 n.

had been removed within the State did the taker or possessor acquire "title and the right to sell and ship the same 'beyond the limit[s] of the State, without restriction or reservation.'" 278 U. S., at 8.

Ignoring the niceties of "title" to the shrimp and concentrating instead on the purposes and effects of the statute, *Foster-Fountain Packing* struck down the statute as economic protectionism abhorrent to the Commerce Clause. The analysis resembled that employed in the natural gas cases, which were cited with approval, *id.*, at 10–11, 13.[12] *Geer* was distinguished on the ground that there "[n]o part of the game was permitted by the statute to become an article of interstate commerce." 278 U. S., at 12.[13] Limiting *Geer* to cases involving complete embargoes on interstate commerce in a wild animal created the anomalous result that the most burdensome laws enjoyed the most protection from Commerce Clause attack.

Foster-Fountain Packing's implicit shift away from *Geer*'s formalistic "ownership" analysis became explicit in *Toomer* v. *Witsell*, 334 U. S. 385, 402 (1948), which struck down as violations of the Commerce Clause and the Privileges and

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[12] The Court cited these cases for the proposition that "[a] State is without power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the ground that they are required to satisfy local demands or because they are needed by the people of the State." *Id.*, at 10.

[13] "As the representative of its people, the State might have retained the shrimp for consumption and use therein. . . . But by permitting its shrimp to be taken and all the products thereof to be shipped and sold in interstate commerce, the State necessarily releases its hold and, as to the shrimp so taken, definitely terminates its control. Clearly such authorization and the taking in pursuance thereof put an end to the trust upon which the State is deemed to own or control the shrimp for the benefit of its people. And those taking the shrimp under the authority of the Act necessarily thereby become entitled to the rights of private ownership and the protection of the commerce clause." *Id.*, at 13.

Immunities Clause certain South Carolina laws discriminating against out-of-state commercial fishermen:

> "The whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource. And there is no necessary conflict between that vital policy consideration and the constitutional command that the State exercise that power, like its other powers, so as not to discriminate without reason against citizens of other States."

Although stated in reference to the Privileges and Immunities Clause challenge, this reasoning is equally applicable to the Commerce Clause challenge.[14] *Douglas* v. *Seacoast Products, Inc.*, 431 U. S. 265 (1977), dispelled any doubts on that score. In rejecting the argument that Virginia's "ownership" of fish swimming in its territorial waters empowered the State to forbid fishing by federally licensed ships owned by nonresidents while permitting residents to fish, *Seacoast Products* explicitly embraced the analysis of the *Geer* dissenters:

> "A State does not stand in the same position as the owner of a private game preserve and it is pure fantasy to talk of 'owning' wild fish, birds, or animals. Neither the States nor the Federal Government, any more than a hopeful fisherman or hunter, has title to these creatures until they are reduced to possession by skillful capture. . . . *Geer* v. *Connecticut*, 161 U. S. 519, 539–540 (1896)

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[14] See *Hicklin* v. *Orbeck*, 437 U. S. 518, 531–532 (1978). The Court distinguished *Geer* on the same basis used in *Foster-Fountain Packing* Co., 334 U. S., at 404–406. *Takahashi* v. *Fish & Game Comm'n*, 334 U. S. 410, 420–421 (1948), decided the same day as *Toomer*, reviewed the cases distinguishing and questioning *Geer* and found the State's claim to "ownership" inadequate to justify a ban on commercial fishing by alien residents.

(Field, J., dissenting). The 'ownership' language of cases such as those cited by appellant must be understood as no more than a 19th-century legal fiction expressing 'the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.' [Citing *Toomer.*] Under modern analysis, the question is simply whether the State has exercised its police power in conformity with the federal laws and Constitution." 431 U. S., at 284.[15]

C

The case before us is the first in modern times to present facts essentially on all fours with *Geer.*[16] We now conclude that challenges under the Commerce Clause to state regulations of wild animals should be considered according to the same general rule applied to state regulations of other natural resources, and therefore expressly overrule *Geer.* We thus bring our analytical framework into conformity with practical realities. Overruling *Geer* also eliminates the anomaly, created by the decisions distinguishing *Geer,* that statutes imposing the most extreme burdens on interstate commerce (essentially total embargoes) were the most immune from challenge. At the same time, the general rule we adopt in this case makes ample allowance for preserving, in ways not

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[15] "In more recent years . . . the Court has recognized that the States' interest in regulating and controlling those things they claim to 'own,' including wildlife, is by no means absolute. States may not compel the confinement of the benefits of their resources, even their wildlife, to their own people whenever such hoarding and confinement impedes interstate commerce. *Foster-Fountain Packing Co.* v. *Haydel,* 278 U. S. 1 (1928); *Pennsylvania* v. *West Virginia,* 262 U. S. 553 (1923); *West* v. *Kansas Natural Gas Co.,* 221 U. S. 229 (1911)." *Baldwin* v. *Montana Fish & Game Comm'n,* 436 U. S. 371, 385–386 (1978).

[16] See, *e. g., Douglas* v. *Seacoast Products, Inc.,* 431 U. S. 265, 285 n. 21 (1977).

inconsistent with the Commerce Clause, the legitimate state concerns for conservation and protection of wild animals underlying the 19th-century legal fiction of state ownership.

II

We turn then to the question whether the burden imposed on interstate commerce in wild game by § 4-115 (B) is permissible under the general rule articulated in our precedents governing other types of commerce. See, *e. g.*, *Pike* v. *Bruce Church, Inc.*, 397 U. S., at 142, quoted, *supra*, at 331. Under that general rule, we must inquire (1) whether the challenged statute regulates evenhandedly with only "incidental" effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect; (2) whether the statute serves a legitimate local purpose; and, if so, (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce. The burden to show discrimination rests on the party challenging the validity of the statute, but "[w]hen discrimination against commerce . . . is demonstrated, the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." *Hunt* v. *Washington Apple Advertising Comm'n*, 432 U. S. 333, 353 (1977). Furthermore, when considering the purpose of a challenged statute, this Court is not bound by "[t]he name, description or characterization given it by the legislature or the courts of the State," but will determine for itself the practical impact of the law. *Lacoste* v. *Louisiana Dept. of Conservation*, 263 U. S. 545, 550 (1924); see *Foster-Fountain Packing Co.* v. *Haydel*, 278 U. S., at 10; *Pike* v. *Bruce Church, Inc.*, *supra*.

Section 4–115 (B) on its face discriminates against interstate commerce. It forbids the transportation of natural min-

nows out of the State for purposes of sale, and thus "overtly blocks the flow of interstate commerce at [the] State's borders." *Philadelphia* v. *New Jersey*, 437 U. S., at 624. Such facial discrimination by itself may be a fatal defect, regardless of the State's purpose, because "the evil of protectionism can reside in legislative means as well as legislative ends." *Id.*, at 626.[17] At a minimum such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives.

Oklahoma argues that § 4–115 (B) serves a legitimate local purpose in that it is "readily apparent as a conservation measure." Brief for Appellee 8. The State's interest in maintaining the ecological balance in state waters by avoiding the removal of inordinate numbers of minnows may well qualify as a legitimate local purpose. We consider the States' interests in conservation and protection of wild animals as legitimate local purposes similar to the States' interests in protecting the health and safety of their citizens. See, *e. g.*, *Firemen* v. *Chicago, R. I. & P. R. Co.*, 393 U. S. 129 (1968). But the scope of legitimate state interests in "conservation" is narrower under this analysis than it was under *Geer*. A State may no longer "keep the property, if the sovereign so chooses, always within its jurisdiction for every purpose." *Geer* v. *Connecticut*, 161 U. S., at 530. The fiction of state ownership may no longer be used to force those outside the State to bear the full costs of "conserving" the wild animals within its borders when equally effective nondiscriminatory conservation measures are available.

Far from choosing the least discriminatory alternative,

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[17] "[W]hatever [a State's] ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently." *Philadelphia* v. *New Jersey*, 437 U. S., at 626–627.

Oklahoma has chosen to "conserve" its minnows in the way that most overtly discriminates against interstate commerce. The State places no limits on the numbers of minnows that can be taken by licensed minnow dealers; nor does it limit in any way how these minnows may be disposed of within the State.[18] Yet it forbids the transportation of any commercially significant number of natural minnows out of the State for sale.[19] Section 4–115 (B) is certainly not a "last ditch" attempt at conservation after nondiscriminatory alternatives have proved unfeasible. It is rather a choice of the most discriminatory means even though nondiscriminatory alternatives would seem likely to fulfill the State's purported legitimate local purpose more effectively.[20]

We therefore hold that § 4–115 (B) is repugnant to the Commerce Clause.

III

The overruling of *Geer* does not leave the States powerless to protect and conserve wild animal life within their borders. Today's decision makes clear, however, that States may pro-

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[18] See n. 1, *supra*.

[19] Section 4–115 (B) does not apply to persons transporting three dozen or less natural minnows outside the State. See n. 1, *supra*.

[20] In its brief, Oklahoma argues, apparently for the first time, that the discrimination against out-of-state sales of natural minnows is justified because minnows purchased in the State are more likely to be used for bait in state waters. Brief for Appellee 3. The State contends that minnows "returned" to state waters as bait do not upset the ecological balance as much as those that never "return." The late appearance of this argument and the total absence of any record support for the questionable factual assumptions that underlie it give it the flavor of a *post hoc* rationalization. The State's bare assertion is certainly inadequate to survive the scrutiny invoked by the facial discrimination of § 4–115 (B). In any case, Oklahoma itself concedes that the "return" of natural minnows as bait is irrelevant to most aspects of preserving ecological balance. Brief for Appellee 4.

mote this legitimate purpose only in ways consistent with the basic principle that "our economic unit is the Nation," *H. P. Hood & Sons, Inc.* v. *Du Mond,* 336 U. S., at 537, and that when a wild animal "becomes an article of commerce . . . its use cannot be limited to the citizens of one State to the exclusion of citizens of another State." *Geer* v. *Connecticut, supra,* at 538 (Field, J., dissenting).

Reversed.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.

This Court's seeming preoccupation in recent years with laws relating to wildlife must, I suspect, appear curious to casual observers of this institution.[1] It is no more curious, however, than this Court's recent pronouncements on the validity of *Geer* v. *Connecticut,* 161 U. S. 519 (1896). For less than one year ago we unreservedly reaffirmed the principles announced in *Geer. Baldwin* v. *Montana Fish & Game Comm'n,* 436 U. S. 371, 386 (1978). Today, the Court overrules that decision. Because I disagree with the Court's overruling of *Geer* and holding that Oklahoma's law relating to the sale of minnows violates the Commerce Clause, I dissent.

In its headlong rush to overrule *Geer,* the Court characterizes that decision as "rest[ing] on the holding that no interstate commerce was involved." *Ante,* at 327. It is true that one of the rationales relied on by the *Geer* Court was that the State could exercise its power to control the killing and ownership of animals *ferae naturae* to prohibit such game

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[1] See, *e. g., TVA* v. *Hill,* 437 U. S. 153 (1978) (snail darters); *Baldwin* v. *Montana Fish & Game Comm'n,* 436 U. S. 371 (1978) (elk); *Douglas* v. *Seacoast Products, Inc.,* 431 U. S. 265 (1977) (menhaden); *Kleppe* v. *New Mexico,* 426 U. S. 529 (1976) (wild horses and burros).

from leaving the borders of the State and thus prevent the game from ever becoming the objects of interstate commerce. 161 U. S., at 530–532. Since the Court in *Geer* was of the view that the challenged statute effectively prevented certain game from entering the stream of interstate commerce, there could be no basis for a Commerce Clause challenge to the State's law. *Id.*, at 530, 532.[2] I do not dispute the Court's rejection of this theory; as the Court points out, this rationale was rejected long before today. *Ante*, at 329; see *West* v. *Kansas Natural Gas Co.*, 221 U. S. 229 (1911). My objection is that this line of reasoning, while undoubtedly considered important by the majority in *Geer*, is unnecessary to sustain that decision [3] and is unneeded in the disposition of the pres-

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[2] "The fact that internal commerce may be distinct from interstate commerce, destroys the whole theory upon which the argument of the plaintiff in error proceeds. The power of the State to control the killing of and ownership in game being admitted, the commerce in game, which the state law permitted, was necessarily only internal commerce, since the restriction that it should not become the subject of external commerce went along with the grant and was a part of it." *Geer* v. *Connecticut*, 161 U. S., at 532.

[3] The Court in *Geer* assigned an alternative basis for its decision. The Court held that a State, in the exercise of its police power, could act to preserve for its people a valuable food supply, even though interstate commerce was remotely and indirectly affected.

"Aside from the authority of the State, derived from the common ownership of game and the trust for the benefit of its people which the State exercises in relation thereto, there is another view of the power of the State in regard to the property in game, which is equally conclusive. The right to preserve game flows from the undoubted existence in the State of a police power to that end, which may be none the less efficiently called into play, because by doing so interstate commerce may be remotely and indirectly affected. *Kidd* v. *Pearson*, 128 U. S. 1, *Hall* v. *De Cuir*, 95 U. S. 485; *Sherlock* v. *Alling*, 93 U. S. 99, 103; *Gibbons* v. *Ogden*, 9 Wheat. 1. Indeed, the source of the police power as to game birds (like those covered by the statute here called into question) flows from the duty of the State to preserve for its people a valuable food supply." *Id.*, at 534. See also *New York ex rel. Silz* v. *Hesterberg*, 211 U. S. 31, 41–42 (1908);

ent case. And no one—not the Oklahoma Court of Criminal Appeals or the State in this Court—contends that the minnows at issue are not the subjects of interstate commerce. It is obvious that the Court has simply set this theory up as a sort of strawman to facilitate the toppling of a decision which, in other respects, enunciates principles that have remained valid and vital, albeit somewhat refined, at least until today.[4]

The Court in *Geer* expressed the view derived from Roman law that the wild fish and game located within the territorial limits of a State are the common property of its citizens and that the State, as a kind of trustee, may exercise this common "ownership" for the benefit of its citizens. 161 U. S., at 529. Admittedly, a State does not "own" the wild creatures within its borders in any conventional sense of the word.[5] *Baldwin* v. *Montana Fish & Game Comm'n, supra,* at 386; *Douglas* v. *Seacoast Products, Inc.,* 431 U. S. 265, 284 (1977); *Toomer* v. *Witsell,* 334 U. S. 385, 401–402 (1948); *Missouri* v. *Holland,* 252 U. S. 416, 434 (1920). But the concept expressed by the "ownership" doctrine is not obsolete. *Baldwin* v. *Montana Fish & Game Comm'n, supra,* at 392 (BURGER, C. J., concurring). This Court long has recognized that the ownership

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Pennsylvania v. *West Virginia,* 262 U. S. 553, 601 (1923) (Holmes, J., dissenting).

[4] Certain of the statements in the Court's opinion provide a basis for some hope that these principles may yet survive the overruling of *Geer.* See *ante,* at 337: "We consider the States' interests in conservation and protection of wild animals as legitimate local purposes"; *ante,* at 338: "The overruling of *Geer* does not leave the States powerless to protect and conserve wild animal life within their borders."

[5] The *Geer* Court itself did not use the term "ownership" in any proprietary sense. See 161 U. S., at 529: " 'We take it to be the correct doctrine in this country, that the ownership of wild animals, so far as they are capable of ownership, is in the State, not as a proprietor but in its sovereign capacity as the representative and for the benefit of all its people in common.' "

language of *Geer* and similar cases is simply a shorthand way of describing a State's substantial interest in preserving and regulating the exploitation of the fish and game and other natural resources within its boundaries for the benefit of its citizens. 436 U. S., at 386; *Douglas* v. *Seacoast Products, Inc., supra,* at 284; *Toomer* v. *Witsell, supra,* at 402.

In recognition of this important state interest, the Court has upheld a variety of regulations designed to conserve and maintain the natural resources of a State. See, *e. g., Baldwin* v. *Montana Fish & Game Comm'n, supra; Huron Portland Cement Co.* v. *Detroit,* 362 U. S. 440 (1960); *Lacoste* v. *Louisiana Dept. of Conservation,* 263 U. S. 545 (1924); *Patsone* v. *Pennsylvania,* 232 U. S. 138 (1914); *Geer* v. *Connecticut, supra; Manchester* v. *Massachusetts,* 139 U. S. 240 (1891); *McCready* v. *Virginia,* 94 U. S. 391 (1877); *Smith* v. *Maryland,* 18 How. 71 (1855). To be sure, a State's power to preserve and regulate wildlife within its borders is not absolute.[6] But the State is accorded wide latitude in fashioning regulations appropriate for protection of its wildlife. Unless the regulation directly conflicts with a federal statute or treaty, *Douglas* v. *Seacoast Products, Inc., supra,* at 283–285; *Kleppe* v. *New Mexico,* 426 U. S. 529, 546 (1976); *Missouri* v. *Holland, supra,* at 434; allocates access in a manner that violates the Fourteenth Amendment, *Takahashi* v. *Fish & Game Comm'n,* 334 U. S. 410 (1948); or represents a naked attempt to discriminate against out-of-state enterprises in favor of in-state businesses unrelated to any purpose of conservation, *Foster-Fountain Packing Co.* v. *Haydel,* 278 U. S. 1, 13 (1928), the State's special interest in preserving its wild-

[6] *Geer* recognized limits to the exercise of the State's power to preserve wildlife within its boundaries. See *id.,* at 528 (this power, which the Colonies possessed, remains in the States "at the present day, in so far as its exercise may be not incompatible with, or restrained by, the rights conveyed to the Federal government by the Constitution").

life should prevail. And this is true no matter how "Balkanized" the resulting pattern of commercial activity.[7]

The Oklahoma law at issue in this case serves the special interest of the State, as representative of its citizens, in preserving and regulating exploitation of free-swimming minnows found within its waters. "[T]he law serve[s] to protect against the depletion of minnows in Oklahoma's natural streams through commercial exportation." 572 P. 2d 573, 575 (Okla. Crim. App. 1977). Oklahoma's statutory scheme may not be the most artfully designed to accomplish its pur-

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[7] This view is fully consistent with the balancing approach to Commerce Clause decisionmaking enunciated in *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137 (1970), relied on so heavily by the Court. *Ante*, at 336. In *Pike*, the Court stated:

"Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." 397 U. S., at 142.

Given the primacy of the local interest here, in the absence of conflicting federal regulation I would require one challenging a state conservation law on Commerce Clause grounds to establish a far greater burden on interstate commerce than is shown in this case. See *infra*, at 344–345. See also *Hunt* v. *Washington Apple Advertising Comm'n*, 432 U. S. 333, 350 (1977): "[O]ur opinions have long recognized that, 'in the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it'"; *H. P. Hood & Sons, Inc.* v. *Du Mond*, 336 U. S. 525, 567 (1949) (Frankfurter, J., dissenting): "Behind the distinction between 'substantial' and 'incidental' burdens upon interstate commerce is a recognition that, in the absence of federal regulation, it is sometimes—of course not always—of greater importance that local interests be protected than that interstate commerce be not touched."

pose.[8] But the range of regulations that a State may adopt under these circumstances is extremely broad, particularly where, as here, the burden on interstate commerce is, at most, minimal. See *Douglas* v. *Seacoast Products, Inc.*, 431 U. S., at 288 (REHNQUIST, J., concurring in part and dissenting in part); *Lacoste* v. *Louisiana Dept. of Conservation, supra,* at 552; cf. *Baldwin* v. *Montana Fish & Game Comm'n,* 436 U. S., at 391; *Kleppe* v. *New Mexico, supra,* at 545.

Contrary to the view of the Court, I do not think that Oklahoma's regulation of the commercial exploitation of natural minnows either discriminates against out-of-state enterprises in favor of local businesses or that it burdens the interstate commerce in minnows. At least, no such showing has been made on the record before us. Cf. *Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 U. S. 132, 154 (1963). This is not a case where a State's regulation permits residents to export naturally seined minnows but prohibits nonresidents from so doing. No person is allowed to export natural minnows for sale outside of Oklahoma; the statute is evenhanded in its application. See Okla. Stat., Tit. 29, § 4–115 (B) (Supp. 1978). The State has not used its power to protect its own citizens from outside competition. See *Hunt* v. *Washington Apple Advertising Comm'n,* 432 U. S. 333 (1977); *H. P. Hood & Sons, Inc.* v. *Du Mond,* 336 U. S. 525 (1949). Nor is this a

[8] The Court seems to doubt the conservation purpose of the Oklahoma law because the State places no limit on the number of minnows a licensed dealer may take from state waters and imposes no regulation governing the disposition of minnows within the State. *Ante,* at 337–338, and n. 20. But the State could rationally have concluded that it could adequately preserve its natural minnow population without such additional measures. Tr. of Oral Arg. 18, 20, 21–23. Since, in my view, the prohibition on export of naturally seined minnows imposes little, if any, burden on the interstate commerce in minnows, the State has not violated the Commerce Clause by choosing an export ban on natural minnows as the means to effectuate its special interest in conserving wildlife located within its territorial limits.

case where a State requires a nonresident business, as a condition to exporting minnows, to move a significant portion of its operations to the State or to use certain state resources in pursuit of its business for the benefit of the local economy. See *Toomer* v. *Witsell*, 334 U. S. 385 (1948); *Foster-Fountain Packing Co.* v. *Haydel*, 278 U. S. 1 (1928); *Johnson* v. *Haydel*, 278 U. S. 16 (1928); cf. *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137, 145 (1970). And, notwithstanding the Court's protestations to the contrary, Oklahoma has not blocked the flow of interstate commerce in minnows at the State's borders. See *ante*, at 336–337. Appellant, or anyone else, may freely export as many minnows as he wishes, so long as the minnows so transported are hatchery minnows and not naturally seined minnows. On this record, I simply fail to see how interstate commerce in minnows, the commodity at issue here, is impeded in the least by Oklahoma's regulatory scheme.[9]

Oklahoma does regulate the manner in which both residents and nonresidents procure minnows to be sold outside the State. But there is no showing in this record that requiring appellant to purchase his minnows from hatcheries instead of from persons licensed to seine minnows from the State's waters in any way increases appellant's costs of doing business. There also is nothing in the record to indicate that naturally seined minnows are any more desirable as items of commerce than hatchery minnows. So far as the record before us indicates, hatchery minnows and naturally seined minnows are fungible. Accordingly, any minimal burden that may result from requiring appellant to purchase minnows destined for sale out of state from hatcheries instead of from

[9] Thus, even putting aside the decision in *Geer* and the principles for which it has come to be known and considering the Oklahoma statute "according to the same general rule applied to state regulations of other natural resources," *ante*, at 335, the Court still has failed to explain how Oklahoma's laws burden or discriminate against interstate commerce in minnows.

those licensed to seine minnows is, in my view, more than outweighed by Oklahoma's substantial interest in conserving and regulating exploitation of its natural minnow population. I therefore would affirm the judgment of the Oklahoma Court of Criminal Appeals.

Syllabus

PARHAM *v.* HUGHES

APPEAL FROM THE SUPREME COURT OF GEORGIA

No. 78-3. Argued January 15, 1979—Decided April 24, 1979

A Georgia statute, while permitting the mother of an illegitimate child, or the father if he has legitimated the child and there is no mother, to sue for the wrongful death of the child, precludes a father who has not legitimated a child from so suing. Appellant, the father of an illegitimate child, whom he had not legitimated and who was killed, along with the mother, in an automobile accident, sued for the child's wrongful death, and the Georgia trial court, denying a summary judgment for the defendant (appellee), held that the statute violated both the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The Georgia Supreme Court reversed, holding that the statutory classification was rationally related to three specified legitimate state interests.

Held: The judgment is affirmed. Pp. 351–359; 359–361.

241 Ga. 198, 243 S. E. 2d 867, affirmed.

MR. JUSTICE STEWART, joined by MR. CHIEF JUSTICE BURGER, MR. JUSTICE REHNQUIST, and MR. JUSTICE STEVENS, concluded that:

1. The Georgia statute does not violate the Equal Protection Clause. Pp. 351–358.

(a) If the statute is not invidiously discriminatory, it is entitled to a presumption of validity and will be upheld "unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational," *Vance* v. *Bradley*, 440 U. S. 93, 97. Pp. 351–352.

(b) The rationale that it is unjust and ineffective for society to express its condemnation of procreation outside the marital relationship by punishing the illegitimate child who is in no way responsible for his situation and is unable to change it, *Weber* v. *Aetna Casualty & Surety Co.*, 406 U. S. 164, is inapplicable to the statute in question, which does not impose differing burdens or award differing benefits to legitimate and illegitimate children but simply denies a natural father the right to sue for his illegitimate child's wrongful death. Pp. 352–353.

(c) The statute does not invidiously discriminate against appellant simply because he is of the male sex. The conferral of the right of a

natural father to sue for his child's wrongful death only if he has previously acted to identify himself, to undertake his paternal responsibilities, and to make his child legitimate, does not reflect any overbroad generalizations about men as a class, but rather the reality that in Georgia only a father can by unilateral action legitimate an illegitimate child. *Reed* v. *Reed*, 404 U. S. 71; *Frontiero* v. *Richardson*, 411 U. S. 677; *Stanton* v. *Stanton*, 421 U. S. 7, distinguished. Pp. 353–357.

(d) The statutory classification is a rational means for dealing with the problem of proving paternity. If paternity has not been established before the commencement of a wrongful-death action, a defendant may be faced with the possibility of multiple lawsuits by individuals all claiming to be the deceased child's father. Pp. 357–358.

2. Nor does the Georgia statute violate the Due Process Clause, *Stanley* v. *Illinois*, 405 U. S. 645, distinguished. Pp. 358–359.

MR. JUSTICE POWELL concluded that the gender-based distinction in the Georgia statute does not violate equal protection inasmuch as it is substantially related to the State's objective of avoiding difficult problems in proving paternity after the death of an illegitimate child. Pp. 359–361.

STEWART, J., announced the judgment of the Court and delivered an opinion, in which BURGER, C. J., and REHNQUIST and STEVENS, JJ., joined. POWELL, J., filed an opinion concurring in the judgment, *post*, p. 359. WHITE, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined, *post*, p. 361.

Thomas E. Greer argued the cause for appellant. With him on the brief was *Robert D. Tisinger*.

A. Montague Miller argued the cause and filed a brief for appellee.

MR. JUSTICE STEWART announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, MR. JUSTICE REHNQUIST, and MR. JUSTICE STEVENS joined.

Under § 105–1307 of the Georgia Code (1978) (hereinafter Georgia statute),[1] the mother of an illegitimate child can

[1] Section 105–1307 provides:

"A mother, or, if no mother, a father, may recover for the homicide of a child, minor or sui juris, unless said child shall leave a wife, husband or

sue for the wrongful death of that child. A father who has legitimated a child can also sue for the wrongful death of the child if there is no mother. A father who has not legitimated a child, however, is precluded from maintaining a wrongful-death action. The question presented in this case is whether this statutory scheme violates the Equal Protection or Due Process Clause of the Fourteenth Amendment by denying the father of an illegitimate child who has not legitimated the child the right to sue for the child's wrongful death.

I

The appellant was the biological father of Lemuel Parham, a minor child who was killed in an automobile collision. The child's mother, Cassandra Moreen, was killed in the same collision. The appellant and Moreen were never married to each other, and the appellant did not legitimate the child as he could have done under Georgia law.[2] The appellant did, however, sign the child's birth certificate and contribute to his support.[3] The child took the appellant's name and was visited by the appellant on a regular basis.

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child. The mother or father shall be entitled to recover the full value of the life of such child. *In suits by the mother the illegitimacy of the child shall be no bar to a recovery.*" (Emphasis added.)

[2] Under Ga. Code § 74–103 (1978), a natural father can have his child legitimated by court order. Section 74–103 provides:

"A father of an illegitimate child may render the same legitimate by petitioning the superior court of the county of his residence, setting forth the name, age, and sex of such child, and also the name of the mother; and if he desires the name changed, stating the new name, and praying the legitimation of such child. Of this application the mother, if alive, shall have notice. Upon such application, presented and filed, the court may pass an order declaring said child to be legitimate, and capable of inheriting from the father in the same manner as if born in lawful wedlock, and the name by which he or she shall be known."

[3] Under Ga. Code § 74–202 (1978), a father is required to support an illegitimate child until the child reaches 18, marries, or becomes self-supporting, whichever occurs first.

After the child was killed in the automobile collision, the appellant brought an action seeking to recover for the allegedly wrongful death. The complaint named the appellee (the driver of the other automobile involved in the collision) as the defendant, and charged that negligence on the part of the appellee had caused the death of the child. The child's maternal grandmother, acting as administratrix of his estate, also brought a lawsuit against the appellee to recover for the child's wrongful death.[4]

The appellee filed a motion for summary judgment in the present case, asserting that under the Georgia statute the appellant was precluded from recovering for his illegitimate child's wrongful death. The trial court held that the Georgia statute violated both the Due Process and Equal Protection Clauses of the Fourteenth Amendment and, accordingly, denied a summary judgment in favor of the appellee. On appeal, the Georgia Supreme Court reversed the ruling of the trial court. 241 Ga. 198, 243 S. E. 2d 867. The appellate court found that the statutory classification was rationally related to three legitimate state interests: (1) the interest in avoiding difficult problems of proving paternity in wrongful-death actions; (2) the interest in promoting a legitimate family unit; and (3) the interest in setting a standard of morality by not according to the father of an illegitimate child the statutory right to sue for the child's death. Accordingly, the court held that the statute did not violate either the Equal Protection or Due Process Clause of the Fourteenth Amendment. We noted probable jurisdiction of this appeal from the judgment of the Georgia Supreme Court. 439 U. S. 815.

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[4] Georgia Code § 105–1309 (1978) provides:

"In cases where there is no person entitled to sue under the foregoing provisions of this Chapter [the wrongful-death Chapter], the administrator or executor of the decedent may sue for and recover and hold the amount recovered for the benefit of the next of kin. In any such case the amount of the recovery shall be the full value of the life of the decedent."

II

State laws are generally entitled to a presumption of validity against attack under the Equal Protection Clause. *Lockport* v. *Citizens for Community Action*, 430 U. S. 259, 272. Legislatures have wide discretion in passing laws that have the inevitable effect of treating some people differently from others, and legislative classifications are valid unless they bear no rational relationship to a permissible state objective. *New York City Transit Authority* v. *Beazer*, 440 U. S. 568; *Vance* v. *Bradley*, 440 U. S. 93; *Massachusetts Bd. of Retirement* v. *Murgia*, 427 U. S. 307, 314; *Dandridge* v. *Williams*, 397 U. S. 471, 485.

Not all legislation, however, is entitled to the same presumption of validity. The presumption is not present when a State has enacted legislation whose purpose or effect is to create classes based upon racial criteria, since racial classifications, in a constitutional sense, are inherently "suspect." *McLaughlin* v. *Florida*, 379 U. S. 184; *Brown* v. *Board of Education*, 347 U. S. 483. And the presumption of statutory validity may also be undermined when a State has enacted legislation creating classes based upon certain other immutable human attributes. See, *e. g.*, *Oyama* v. *California*, 332 U. S. 633 (national origin); *Graham* v. *Richardson*, 403 U. S. 365 (alienage); *Gomez* v. *Perez*, 409 U. S. 535 (illegitimacy); *Reed* v. *Reed*, 404 U. S. 71 (gender).

In the absence of invidious discrimination, however, a court is not free under the aegis of the Equal Protection Clause to substitute its judgment for the will of the people of a State as expressed in the laws passed by their popularly elected legislatures. "The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." *Vance* v. *Bradley*, 440 U. S., at 97 (footnote omitted). The thresh-

old question, therefore, is whether the Georgia statute is invidiously discriminatory. If it is not, it is entitled to a presumption of validity and will be upheld "unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational." *Ibid.*

III

The appellant relies on decisions of the Court that have invalidated statutory classifications based upon illegitimacy and upon gender to support his claim that the Georgia statute is unconstitutional. Both of these lines of cases have involved laws reflecting invidious discrimination against a particular class. We conclude, however, that neither line of decisions is applicable in the present case.

A

The Court has held on several occasions that state legislative classifications based upon illegitimacy—*i. e.*, that differentiate between illegitimate children and legitimate children—violate the Equal Protection Clause. *E. g., Trimble* v. *Gordon,* 430 U. S. 762; *Weber* v. *Aetna Casualty & Surety Co.,* 406 U. S. 164.[5] The basic rationale of these decisions is that it is unjust and ineffective for society to express its condemnation of procreation outside the marital relationship by punishing the illegitimate child who is in no way responsible for his situation and is unable to change it. As MR. JUSTICE POWELL stated for the Court in the *Weber* case:

> "The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons be-

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[5] In cases where statutory classifications affecting illegitimates are so precisely structured as to further a sufficiently adequate state interest, however, the Court has upheld the validity of the statutes. *Lalli* v. *Lalli,* 439 U. S. 259; *Mathews* v. *Lucas,* 427 U. S. 495; *Labine* v. *Vincent,* 401 U. S. 532.

yond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent." *Id.*, at 175.

It is apparent that this rationale is in no way applicable to the Georgia statute now before us. The statute does not impose differing burdens or award differing benefits to legitimate and illegitimate children. It simply denies a natural father the right to sue for his illegitimate child's wrongful death. The appellant, as the natural father, was responsible for conceiving an illegitimate child and had the opportunity to legitimate the child but failed to do so. Legitimation would have removed the stigma of bastardy and allowed the child to inherit from the father in the same manner as if born in lawful wedlock. Ga. Code § 74–103 (1978). Unlike the illegitimate child for whom the status of illegitimacy is involuntary and immutable, the appellant here was responsible for fostering an illegitimate child and for failing to change its status. It is thus neither illogical nor unjust for society to express its "condemnation of irresponsible liaisons beyond the bounds of marriage" by not conferring upon a biological father the statutory right to sue for the wrongful death of his illegitimate child. The justifications for judicial sensitivity to the constitutionality of differing legislative treatment of legitimate and illegitimate children are simply absent when a classification affects only the fathers of deceased illegitimate children.

B

The Court has also held that certain classifications based upon sex are invalid under the Equal Protection Clause, *e. g.*,

Reed v. *Reed*, 404 U. S. 71; *Stanton* v. *Stanton*, 421 U. S. 7; *Frontiero* v. *Richardson*, 411 U. S. 677; *Craig* v. *Boren*, 429 U. S. 190. Underlying these decisions is the principle that a State is not free to make overbroad generalizations based on sex which are entirely unrelated to any differences between men and women or which demean the ability or social status of the affected class. Thus, in *Reed* v. *Reed*, *supra*, the Court was faced with the question of the constitutionality of an Idaho probate code provision that gave men a mandatory preference over women, in the same degree of relationship to the decedent, in the administration of the decedent's estate. The Court held that "[b]y providing dissimilar treatment for men and women who are thus similarly situated, the challenged section violates the Equal Protection Clause." 404 U. S., at 77. Similarly, in *Frontiero* v. *Richardson*, *supra*, the Court invalidated the federal Armed Services benefit statutes that were based on the assumption that female spouses of servicemen were financially dependent while similarly situated male spouses of servicewomen were not. 411 U. S., at 690–691. And in the *Stanton* case, the Court held constitutionally invalid a Utah statute which provided that males had to reach a greater age than females to attain majority status. In reaching this result, the Court rejected the "old notion" that the female is "destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas." 421 U. S., at 14–15. See also *Orr* v. *Orr*, 440 U. S. 268.

In cases where men and women are not similarly situated, however, and a statutory classification is realistically based upon the differences in their situations, this Court has upheld its validity. In *Schlesinger* v. *Ballard*, 419 U. S. 498, for example, the Court upheld the constitutionality of a federal statute which provided that male naval officers who were not promoted within a certain length of time were subject to mandatory discharge while female naval officers who were not

promoted within the same length of time could continue as officers. Because of restrictions on women officers' seagoing service, their opportunities to compile records entitling them to promotion were more restricted than were those of their male counterparts. Thus, unlike the *Reed* and *Frontiero* cases where the gender-based classifications were based solely on administrative convenience and outworn cliches, the different treatment in the *Schlesinger* case reflected "not archaic and overbroad generalizations, but, instead, the demonstrable fact that male and female line officers in the Navy are *not* similarly situated with respect to opportunities for professional service." 419 U. S., at 508 (emphasis in original).

With these principles in mind, it is clear that the Georgia statute does not invidiously discriminate against the appellant simply because he is of the male sex. The fact is that mothers and fathers of illegitimate children are not similarly situated. Under Georgia law, only a father can by voluntary unilateral action make an illegitimate child legitimate.[6] Unlike the mother of an illegitimate child whose identity will rarely be in doubt, the identity of the father will frequently be unknown. *Lalli* v. *Lalli*, 439 U. S. 259.[7] By coming forward

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[6] The constitutionality of the legitimation provision of the Georgia statute has not been challenged and is not at issue in this case.

[7] As MR. JUSTICE POWELL stated for the plurality in the *Lalli* case:

"That the child is the child of a particular woman is rarely difficult to prove. Proof of paternity, by contrast, frequently is difficult when the father is not part of a formal family unit. The putative father often goes his way unconscious of the birth of a child. Even if conscious, he is very often totally unconcerned because of the absence of any ties to the mother. Indeed the mother may not know *who* is responsible for her pregnancy." 439 U. S., at 268–269. (Citations omitted.)

In *Glona* v. *American Guarantee & Liability Ins. Co.*, 391 U. S. 73, the Court held that a Louisiana statute that did not allow a natural mother of an illegitimate child to sue for its wrongful death violated the Equal Protection Clause. That cause was quite different from this one. The invidious discrimination perceived in that case was between married and unmarried mothers. There thus existed no real problem of identity

with a motion under § 74–103 of the Georgia Code, however, a father can both establish his identity and make his illegitimate child legitimate.[8]

Thus, the conferral of the right of a natural father to sue for the wrongful death of his child only if he has previously acted to identify himself, undertake his paternal responsibilities, and make his child legitimate, does not reflect any overbroad generalizations about men as a class, but rather the reality that in Georgia only a father can by unilateral action legitimate an illegitimate child. Since fathers who do legitimate their children can sue for wrongful death in precisely the same circumstances as married fathers whose children were legitimate *ab initio*, the statutory classification does not discriminate against fathers as a class but instead distinguishes between fathers who have legitimated their children and those who have not.[9] Such a classification is quite unlike those condemned in the *Reed*, *Frontiero*, and *Stanton* cases which were premised upon overbroad generalizations and excluded

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or of fraudulent claims. See Part IV, *infra*. Moreover, the statute in *Glona* excluded every mother of an illegitimate child from bringing a wrongful-death action while the Georgia statute at issue here excludes only those fathers who have not legitimated their children. Thus, the Georgia statute has in effect adopted "a middle ground between the extremes of complete exclusion and case-by-case determination of paternity." *Trimble* v. *Gordon*, 430 U. S. 762, 771. Cf. *Lalli* v. *Lalli*, *supra*. We need not decide whether a statute which completely precluded fathers, as opposed to mothers, of illegitimate children from maintaining a wrongful-death action would violate the Equal Protection Clause.

[8] See n. 2, *supra*.

[9] The ability of a father to make his child legitimate under Georgia law distinguishes this case from *Caban* v. *Mohammed*, *post*, p. 380, decided today. The Georgia legitimation provision enables the father to change the child's status, and thereby his own for purposes of the wrongful-death statute, and at the same time is a rational method for the State to deal with the problem of proving paternity. *Lalli* v. *Lalli*, *supra*; see Part IV, *infra*. In the *Caban* case, by contrast, the father could change neither his children's status nor his own for purposes of the New York adoption statute.

all members of one sex even though they were similarly situated with members of the other sex.

IV

Having concluded that the Georgia statute does not invidiously discriminate against any class, we still must determine whether the statutory classification is rationally related to a permissible state objective.

This Court has frequently recognized that a State has a legitimate interest in the maintenance of an accurate and efficient system for the disposition of property at death. *E. g., Lalli* v. *Lalli, supra; Trimble* v. *Gordon,* 430 U. S. 762; *Labine* v. *Vincent,* 401 U. S. 532. Of particular concern to the State is the existence of some mechanism for dealing with "the often difficult problem of proving the paternity of illegitimate children and the related danger of spurious claims against intestate estates." *Lalli* v. *Lalli, supra,* at 265. See also *Gomez* v. *Perez,* 409 U. S., at 538.

This same state interest in avoiding fraudulent claims of paternity in order to maintain a fair and orderly system of decedent's property disposition is also present in the context of actions for wrongful death. If paternity has not been established before the commencement of a wrongful-death action, a defendant may be faced with the possibility of multiple lawsuits by individuals all claiming to be the father of the deceased child. Such uncertainty would make it difficult if not impossible for a defendant to settle a wrongful-death action in many cases, since there would always exist the risk of a subsequent suit by another person claiming to be the father.[10] The State of Georgia has chosen to deal with this problem by allowing only fathers who have established their paternity by legitimating their children to sue for wrongful

[10] Indeed, a similar uncertainty is evident in the present case. The appellee has been sued by both the administratrix of the estate and the appellant for the wrongful death of the child.

death, and we cannot say that this solution is an irrational one. Cf. *Lalli* v. *Lalli*, 439 U. S. 259.[11]

The appellant argues, however, that whatever may be the problem with establishing paternity generally, there is no question in this case that he is the father. This argument misconceives the basic principle of the Equal Protection Clause. The function of that provision of the Constitution is to measure the validity of classifications created by state laws.[12] Since we have concluded that the classification created by the Georgia statute is a rational means for dealing with the problem of proving paternity, it is constitutionally irrelevant that the appellant may be able to prove paternity in another manner.

V

The appellant also alleges that the Georgia statute violates the Due Process Clause of the Fourteenth Amendment. Nowhere in the appellant's brief or oral argument, however, is there any explanation of how the Due Process Clause is implicated in this case. The only decision of this Court cited by the appellant that is even remotely related to his due process claim is *Stanley* v. *Illinois*, 405 U. S. 645. In the *Stanley* case, the Court held that a father of illegitimate children who had raised these children was entitled to a hearing on his fitness as a parent before they could be taken from him by the State of Illinois. The interests which the Court found controlling in *Stanley* were the integrity of the family against state interference and the freedom of a father to raise his own children. The present case is quite a different

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[11] We thus need not decide whether the classification created by the Georgia statute is rationally related to the State's interests in promoting the traditional family unit or in setting a standard of morality.

[12] It cannot seriously be argued that a statutory entitlement to sue for the wrongful death of another is itself a "fundamental" or constitutional right.

one, involving as it does only an asserted right to sue for money damages.

For these reasons, the judgment of the Supreme Court of Georgia is affirmed.

It is so ordered.

MR. JUSTICE POWELL, concurring in the judgment.

I agree that the gender-based distinction of Ga. Code § 105–1307 (1978) does not violate equal protection.* I write separately, however, because I arrive at this conclusion by a route somewhat different from that taken by MR. JUSTICE STEWART.

To withstand judicial scrutiny under the Equal Protection Clause, gender-based distinctions must "serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig* v. *Boren,* 429 U. S. 190, 197 (1976). See *Orr* v. *Orr,* 440 U. S. 268, 279 (1979); *Stanton* v. *Stanton,* 421 U. S. 7, 14 (1975); *Reed* v. *Reed,* 404 U. S. 71 (1971). We have recognized in various contexts the importance of a State's interest in minimizing potential problems in identifying the natural father of an illegitimate child. See, *e. g., Caban* v. *Mohammed, post,* at 393 n. 15 (adoptions); *Lalli* v. *Lalli,* 439 U. S. 259, 268–269 (1978) (inheritance); *Gomez* v. *Perez,* 409 U. S. 535, 538 (1973) (child support). Indeed, we have sought to avoid "impos[ing] on state court systems a greater burden" in determining paternity for purposes of wrongful-death actions. *Weber* v. *Aetna Casualty & Surety Co.,* 406 U. S. 164, 174 (1972).

The question, therefore, is whether the gender-based distinction at issue in the present case is substantially related to achievement of the important state objective of avoiding diffi-

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*I also agree with MR. JUSTICE STEWART that the classification of § 105–1307 affects only fathers of illegitimates—not the illegitimates themselves—and therefore that this case differs substantially from those in which we have found classifications based upon illegitimacy to be unconstitutional. See, *e. g., Trimble* v. *Gordon,* 430 U. S. 762 (1977).

cult problems in proving paternity after the death of an illegitimate child. In Ga. Code § 74–103 (1978), the State has provided a simple, convenient mechanism by which the father of an illegitimate child can eliminate all questions concerning the child's parentage. Under that statute, a father can legitimate his child simply by filing a petition in state court identifying the child and its mother and requesting an order of legitimation. After notice has been served on the mother, the state court can enter an order declaring the child legitimate for all purposes of Georgia law.

It is clear that the Georgia statute is substantially related to the State's objective. It lies entirely within a father's power to remove himself from the disability that only he will suffer. The father is required to declare his intentions at a time when both the child and its mother are likely to be available to provide evidence. The mother, on the other hand, is given the opportunity to appear and either support or rebut the father's claim of paternity. The marginally greater burden placed upon fathers is no more severe than is required by the marked difference between proving paternity and proving maternity—a difference we have recognized repeatedly. See, *e. g., Lalli* v. *Lalli, supra,* at 268–269.

I find the present case to be quite different from others in which the Court has found unjustified a State's reliance upon a gender-based classification. In several cases, the Court has confronted a state law under which the burdened individual (whether a child born out of wedlock or the father of such a child) has been powerless to remove himself from the statutory burden—regardless of the proof of paternity. See, *e. g., Caban* v. *Mohammed, post,* p. 380; *Trimble* v. *Gordon,* 430 U. S. 762 (1977). To require marriage between the father and mother often is tantamount to a total exclusion of fathers, as marriage is possible only with the consent of the mother. In the present case, however, no such requirement is imposed upon the father under Georgia law. In sum, therefore, I con-

clude that the Georgia statute challenged in this case, unlike the statutes reviewed in our prior decisions, is substantially related to the State's objective of avoiding difficult problems of proof of paternity.

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN join, dissenting.

Appellant is the father, rather than the mother, of a deceased illegitimate child. It is conceded that for this reason alone he may not bring an action for the wrongful death of his child. Yet four Members of the Court conclude that appellant is not discriminated against "simply" because of his sex, *ante,* at 355, because Georgia provides a means by which fathers can legitimate their children. The dispositive point is that only a father may avail himself of this process. Therefore, we are told, "[t]he fact is that mothers and fathers of illegitimate children are not similarly situated," *ibid.*

There is a startling circularity in this argument. The issue before the Court is whether Georgia may require unmarried fathers, but not unmarried mothers, to have pursued the statutory legitimization procedure in order to bring suit for the wrongful death of their children. Seemingly, it is irrelevant that as a matter of state law mothers may not legitimate their children,[1] for they are not required to do so in order to maintain a wrongful-death action. That only fathers *may* resort to the legitimization process cannot dissolve the sex discrimination in *requiring* them to.[2] Under the plurality's

[1] Although Ga. Code § 74–103 (1978) provides that a father may petition, with notice to the mother, to legitimate his child, mothers are not given a similar right. At least one State provides that either parent, or both, may legitimate a child. La. Civ. Code Ann., Art. 203 (West 1952).

[2] The plurality not only fails to examine whether required resort by fathers to the legitimization procedure bears more than a rational relationship to any state interest, but also fails even to address the constitu-

bootstrap rationale, a State could require that women, but not men, pass a course in order to receive a taxi license, simply by limiting admission to the course to women.[3]

The plain facts of the matter are that the statute conferring the right to recovery for the wrongful death of a child discriminates between unmarried mothers and unmarried fathers, and that this discrimination is but one degree greater than the statutory discrimination between married mothers and married fathers.[4] In order to withstand scrutiny under the Equal Protection Clause, gender-based discrimination "'must serve important governmental objectives and must be substantially related to achievement of those objectives.'" *Caban* v. *Mohammed, post,* at 388, quoting *Craig* v. *Boren,* 429 U. S. 190, 197 (1976). Because none of the interests urged by the State warrant the sex discrimination in this case, I would reverse the judgment below.

I

The Georgia Supreme Court suggested that the state legislature may have denied a right of action to fathers of illegitimate children because of its interests in "promoting a legitimate family unit" and "setting a standard of morality."

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tionality of the sex discrimination in allowing fathers but not mothers to legitimate their children. It is anomalous, at least, to assert that sex discrimination in one statute is constitutionally invisible because it is tied to sex discrimination in another statute, without subjecting *either* of these classifications on the basis of sex to an appropriate level of scrutiny.

[3] Men and women would therefore not be "similarly situated." Yet requiring a course for women but not for men is quite obviously a classification on the basis of sex.

[4] The opinion of MR. JUSTICE STEWART shunts aside the readily apparent classification on the basis of sex in Georgia's wrongful-death scheme by stressing that appellant's child was never made legitimate, but it is only the fortuitous event of the mother's death in this case that makes legitimacy even relevant. In the case of parents of legitimate children, only the mother may sue if she is alive; the father is allowed to sue only "if [there is] no mother." Ga. Code § 105–1307 (1978). See also *infra,* at 368.

241 Ga. 198, 200, 243 S. E. 2d 867, 869–870 (1978). But the actual relationship between these interests and the particular classification chosen is far too tenuous to justify the sex discrimination involved. Cf. *Trimble* v. *Gordon,* 430 U. S. 762, 768 (1977).

Unmarried mothers and those fathers who legitimate their children but remain unmarried presumably also defy the state interest in "the integrity of the family unit." [5] In any event, it is untenable to conclude that denying parents a right to recover when their illegitimate children die will further the asserted state interests. In *Glona* v. *American Guarantee & Liability Ins. Co.,* 391 U. S. 73 (1968), we were faced with the same argument in the context of an unmarried mother's attempt to recover for her child's death in a State allowing wrongful-death suits by parents of legitimate children. Even though that mother—like appellant in this case—had not pursued a statutory procedure whereby she could have unilaterally legitimated her child and thereby become eligible to sue for the child's death,[6] we held that it was impermissible to prevent her from seeking to recover. What we said in *Glona* about unmarried mothers applies equally to unmarried fathers:

> "[W]e see no possible rational basis . . . for assuming that if the natural mother is allowed recovery for the wrongful death of her illegitimate child, the cause of illegitimacy will be served. It would, indeed, be farfetched to assume that women have illegitimate children so that they can be compensated in damages for their death." *Id.,* at 75.

See also *Weber* v. *Aetna Casualty & Surety Co.,* 406 U. S. 164, 173 (1972).

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[5] *Lalli* v. *Lalli,* 439 U. S. 259, 265 (1978). See also *Trimble* v. *Gordon,* 430 U. S. 762, 769 (1977).

[6] See n. 1, *supra; Glona* v. *American Guarantee & Liability Ins. Co.,* 391 U. S., at 79 n. 7 (Harlan, J., dissenting).

II

Another interest suggested by the Georgia Supreme Court, which a majority of the Court today finds pervasive, is that of "forestalling potential problems of proof of paternity," 241 Ga., at 200, 243 S. E. 2d, at 869. Whatever may be the evidentiary problems associated with proof of parenthood where a father, but presumably not a mother,[7] is involved, I am sure that any interest the State conceivably has in simplifying the determination of liability in wrongful-death actions does not justify the outright gender discrimination in this case.

The Court has shown due respect for a State's undoubted interest in effecting a sound system of inheritance that will not unduly tie up the assets of the deceased, including his real estate, and prevent its transmission to and utilization by his heirs and the upcoming generation.[8] Formal documentation of entitlement to inherit may be significant in avoiding unending litigation inimical to this interest. But the State has no comparable interest in protecting a tortfeasor from having his liability litigated and determined in the usual way. There is always the possibility of spurious claims in tort litigation, and

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[7] But cf. *Glona* v. *American Guarantee & Liability Ins. Co.*, *supra*, at 76 ("Opening the courts to suits [by the mother of an illegitimate child] may conceivably be a temptation to some to assert motherhood fraudulently").

[8] See *Lalli* v. *Lalli*, *supra*; *Trimble* v. *Gordon*, *supra*, at 771, and cases cited therein. Where discrimination on a basis triggering heightened judicial scrutiny is alleged, judicial deference has given way in the context of other statutorily created entitlements, see, *e. g.*, *Weinberger* v. *Wiesenfeld*, 420 U. S. 636 (1975); *Gomez* v. *Perez*, 409 U. S. 535 (1973); *Griffin* v. *Richardson*, 409 U. S. 1069 (1972), summarily aff'g 346 F. Supp. 1226 (Md.); *Weber* v. *Aetna Casualty & Surety Co.*, 406 U. S. 164 (1972), including wrongful-death recovery; *Glona*, *supra*; *Levy* v. *Louisiana*, 391 U. S. 68 (1968). In *Weber*, the Court, per MR. JUSTICE POWELL, expressly analogized the state interest in deciding who may sue for wrongful death to the interest in deciding who may receive workmen's compensation, and rejected the assertion that the interest in the latter is as substantial as that in intestacy succession, 406 U. S., at 170–172.

the plaintiff will have the burden of proof if his parenthood is challenged.[9] The legitimization requirement is not merely a rule concerning the competency of evidence [10] but an absolute prerequisite to recovery for the wrongful death of a child, barring many who are capable of proving their parenthood, solely because they are fathers. It denigrates the judicial process, as well as the interest in foreclosing gender-based discriminations, to hold that the possibility of erroneous determinations of paternity in an unknown number of cases, likely to be few, is sufficient reason to forbid all natural, unmarried fathers who have not legitimated their children from seeking to prove their parenthood and recovering in damages for the tort that has been committed.[11]

Much the same is true of the rather lame suggestion that keeping fathers such as this appellant out of court will protect wrongdoers and their insurance companies from multiple re-

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[9] See also *Glona* v. *American Guarantee & Liability Ins. Co., supra,* at 76 ("That problem [of fraudulent assertion of motherhood] . . . concerns burden of proof"). Although appellant in this case has substantial evidence of his paternity and it is clear that but for the legitimization requirement there would be no challenge to his capacity to sue, other unmarried fathers whose paternity is challenged may be unable—particularly when, as here, the mother is dead—to offer sufficient evidence to convince the factfinder of paternity.

[10] Cf. *Mathews* v. *Lucas,* 427 U. S. 495 (1976) (upholding the denial of survivors' benefits under the Social Security Act to illegitimate children unless they are entitled to inherit under state intestacy law or are able to show paternity in one of several other ways, including written acknowledgment by the father, 42 U. S. C. § 402 (d)(3)).

[11] Certainly, the Court has not shown such solicitude for the problem of an erroneous determination of paternity when the claimed father is the defendant rather than the plaintiff. See *Gomez* v. *Perez, supra,* at 538 (holding that a State must entitle illegitimate, as well as legitimate, children to paternal support: "We recognize the lurking problems with respect to proof of paternity. Those problems are not to be lightly brushed aside, but neither can they be made into an impenetrable barrier that works to shield otherwise invidious discrimination").

coveries. This claimed danger is but one of many potential hazards in personal injury litigation, and it is very doubtful that it would be exacerbated if the Georgia statute in this case were stricken down. Assuming that there might be a few occasions where multiple recoveries are threatened, steps could be taken to settle liability in one proceeding, just as actions to quiet title to real estate need not be reopened at every turn. Whatever risks there may be, however, are not sufficient to justify foreclosing suit by the many, many fathers like Parham, about whose parenthood there is very little doubt indeed.[12]

III

The fourth and final interest suggested by the Supreme Court of Georgia as a reason that the state legislature may have denied the wrongful-death action to fathers such as appellant is that "more often than not the father of an illegitimate child who has elected neither to marry the mother nor to legitimate the child pursuant to proper legal proceedings suffers no real loss from the child's wrongful death." 241 Ga., at 200, 243 S. E. 2d, at 870. Unlike the previous hypothesized state interests, this last does at least provide a plausible explanation for the classification at issue. Yet such a legislative conception about fathers of illegitimate children is an unacceptable basis for a blanket discrimination against all such fathers. Whatever may be true with respect to certain of these parents,[13] we have recognized that at least some of them maintain as close a relationship to their children as do unmarried mothers. Thus, in *Caban* v. *Mohammed*, *post*, p. 380, we struck down a statutory discrimination in adoption

[12] See also *Reed* v. *Reed*, 404 U. S. 71, 76 (1971) ("Clearly the objective of reducing the workload on probate courts by eliminating one class of contests is not without some legitimacy. . . . [W]hatever may be said as to the positive values of avoiding intrafamily controversy, the choice in this context may not lawfully be mandated solely on the basis of sex").

[13] See *Lalli* v. *Lalli*, 439 U. S., at 268–269.

proceedings against all unmarried fathers, rejecting the assertion that "broad, gender-based distinction . . . is required by any universal difference between maternal and paternal relations at every phase of a child's development." *Post,* at 389.[14]

Nor does the discrimination against fathers of illegitimate children on the basis of their presumed lack of affection for their children become any more permissible simply because a father who is aware of the State's legitimization procedure may resort to it and thereby become eligible to recover for the wrongful death of his children.[15] Particularly given the facts of this case—where it is conceded that appellant signed his child's birth certificate, continuously contributed to the child's financial support, and maintained daily contact with him [16]—it is unrealistic to presume that unmarried fathers (or mothers [17]) having real interest in their children and suffering palpable loss if their children die will, as a general rule, have pursued a statutory legitimization procedure. Only last Term, we indicated that resort to this very process in the State of

[14] In 1977, 15.5% of all children and 51.7% of the black children born in the United States had unmarried parents. U. S. Dept. of HEW, National Center for Health Statistics, 27 Vital Statistics Report, No. 11, p. 19 (1979). The suggestion that anything approaching a majority of the fathers of these children would "suffe[r] no real loss from the child's wrongful death" is incredible.

[15] In *Caban* v. *Mohammed, post,* at 393 n. 15, we noted that even a father who establishes his paternity in Family Court pursuant to N. Y. Family Court Act §§ 511 to 571 (McKinney 1975 and Supp. 1978–1979) may not object to his child's adoption, and thus refusal to allow such objection was not related to the State's interest that the father "sho[w] that it is in fact his child." As explained, *supra,* at 364–366, I have no doubt that this state interest is insufficient in this case also, since even those many fathers presently able to prove their paternity are precluded from bringing suit. *Caban* certainly did not intimate that the failure of that father to have previously established his paternity might suffice to justify discrimination against him on the basis of presumed differences in maternal and paternal relations.

[16] 241 Ga. 198, 199, 243 S. E. 2d 867, 869 (1978).

[17] See text at n. 6, *supra.*

Georgia is not constitutionally acceptable as a surrogate measure of an unmarried father's interest in his child.[18]

Moreover, it is clear that the discrimination at issue in this case does not proceed from merely a considered legislative determination, however unjustified, that parents such as appellant do not suffer loss when their children die. Rather, the particular discrimination in this case is but part of the pervasive sex discrimination in the statute conferring the right to sue for the wrongful death of a child. Even where the deceased is legitimate, the father is absolutely prohibited from bringing a wrongful-death action if the mother is still alive, even if the mother does not desire to bring suit and even if the parents are separated or divorced. The incredible presumption that fathers, but not mothers, of illegitimate children suffer no injury when they lose their children is thus only a more extreme version of the underlying and equally untenable presumption that fathers are less deserving of recovery than are mothers.

If Georgia would prefer that the amount of wrongful-death recovery be based upon the mental anguish and loss of future income suffered when a child dies—rather than on the "full value of the life of such child," as the statute now provides[19]—it may amend the statute. But it may not categorically eliminate on the basis of sex any recovery by those parents it deems uninjured or undeserving.

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[18] See *Quilloin* v. *Walcott*, 434 U. S. 246, 254 (1978).

[19] See Ga. Code §§ 105–1307, 105–1308 (1978) ("The full value of the life of the decedent, as shown by the evidence, is the full value of the life of the decedent without deduction for necessary or other personal expenses of the decedent had he lived").

Syllabus

NORTH CAROLINA *v.* BUTLER

CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

No. 78–354. Argued March 27, 1979—Decided April 24, 1979

Respondent, while under arrest for certain crimes and after being advised of his rights under *Miranda* v. *Arizona*, 384 U. S. 436, made incriminating statements to the arresting officers. His motion to suppress evidence of these statements on the ground that he had not waived his right to assistance of counsel at the time the statements were made was denied by a North Carolina trial court, and he was subsequently convicted. The North Carolina Supreme Court reversed, holding that *Miranda* requires that no statement of a person under custodial interrogation may be admitted in evidence against him unless, at the time the statement was made, he explicitly waived the right to the presence of a lawyer.

Held: An explicit statement of waiver is not invariably necessary to support a finding that the defendant waived the right to counsel guaranteed by the *Miranda* case. The question of waiver must be determined on the particular facts and circumstances surrounding the case, and there is no reason in a case such as this for a *per se* rule, such as that of the North Carolina Supreme Court. By creating an inflexible rule that no implicit waiver can ever suffice, that court has gone beyond the requirements of federal organic law, and thus its judgment cannot stand, since a state court can neither add to nor subtract from the mandates of the United States Constitution. Pp. 372–376.

295 N. C. 250, 244 S. E. 2d 410, vacated and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, and REHNQUIST, JJ., joined. BLACKMUN, J., filed a concurring statement, *post*, p. 376. BRENNAN, J., filed a dissenting opinion, in which MARSHALL and STEVENS, JJ., joined, *post*, p. 377. POWELL, J., took no part in the consideration or decision of the case.

Lester V. Chalmers, Jr., Special Deputy Attorney General of North Carolina, argued the cause for petitioner. With him on the brief were *Rufus L. Edmisten*, Attorney General, and *Donald W. Stephens* and *Thomas F. Moffitt*, Assistant Attorneys General.

R. Gene Braswell, by appointment of the Court, 439 U. S. 1113, argued the cause and filed a brief for respondent.*

MR. JUSTICE STEWART delivered the opinion of the Court.

In evident conflict with the present view of every other court that has considered the issue, the North Carolina Supreme Court has held that *Miranda* v. *Arizona*, 384 U. S. 436, requires that no statement of a person under custodial interrogation may be admitted in evidence against him unless, at the time the statement was made, he explicitly waived the right to the presence of a lawyer. We granted certiorari to consider whether this *per se* rule reflects a proper understanding of the *Miranda* decision. 439 U. S. 1046.

The respondent was convicted in a North Carolina trial court of kidnaping, armed robbery, and felonious assault. The evidence at his trial showed that he and a man named Elmer Lee had robbed a gas station in Goldsboro, N. C., in December 1976, and had shot the station attendant as he was attempting to escape. The attendant was paralyzed, but survived to testify against the respondent.

The prosecution also produced evidence of incriminating statements made by the respondent shortly after his arrest by Federal Bureau of Investigation agents in the Bronx, N. Y., on the basis of a North Carolina fugitive warrant. Outside the presence of the jury, FBI Agent Martinez testified that at the time of the arrest he fully advised the respondent of the rights delineated in the *Miranda* case. According to the uncontroverted testimony of Martinez, the agents then took the respondent to the FBI office in nearby New Rochelle, N. Y. There, after the agents determined that the respondent had an 11th grade education and was literate, he was given the Bureau's "Advice of Rights" form

*Briefs of *amici curiae* urging reversal were filed by *Solicitor General McCree*, *Assistant Attorney General Heymann*, and *John Voorhees* for the United States; and by *Frank Carrington*, *Wayne W. Schmidt*, and *Fred E. Inbau* for Americans for Effective Law Enforcement, Inc., et al.

which he read.[1] When asked if he understood his rights, he replied that he did. The respondent refused to sign the waiver at the bottom of the form. He was told that he need neither speak nor sign the form, but that the agents would like him to talk to them. The respondent replied: "I will talk to you but I am not signing any form." He then made inculpatory statements.[2] Agent Martinez testified that the respondent said nothing when advised of his right to the assistance of a lawyer. At no time did the respondent request counsel or attempt to terminate the agents' questioning.

At the conclusion of this testimony the respondent moved to suppress the evidence of his incriminating statements on the ground that he had not waived his right to the assistance of counsel at the time the statements were made. The court denied the motion, finding that

> "the statement made by the defendant, William Thomas Butler, to Agent David C. Martinez, was made freely and voluntarily to said agent after having been advised of his rights as required by the Miranda ruling, including his right to an attorney being present at the time of the inquiry and that the defendant, Butler, understood his

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[1] The parties disagree over whether the respondent was also orally advised of his *Miranda* rights at the New Rochelle office. There is no dispute that he was given those warnings orally at the scene of the arrest, or that he read the "Advice of Rights" form in the New Rochelle office. This factual controversy, therefore, is not relevant to the basic issue in this case.

The dissenting opinion points out, *post*, at 378, that at oral argument the respondent's counsel disputed the fact that the respondent is literate. But the trial court specifically found that "it had been . . . determined by Agent Martinez that the defendant has an Eleventh Grade Education and that he could read and write . . . ." App. A–21. This finding, based upon uncontroverted evidence, is binding on this Court.

[2] The respondent admitted to the agents that he and Lee had been drinking heavily on the day of the robbery. He acknowledged that they had decided to rob a gas station, but denied that he had actually participated in the robbery. His friend, he said, had shot the attendant.

> rights; [and] that he effectively waived his rights, including the right to have an attorney present during the questioning by his indication that he was willing to answer questions, having read the rights form together with the Waiver of Rights . . . ." App. A–22 to A–23.

The respondent's statements were then admitted into evidence, and the jury ultimately found the respondent guilty of each offense charged.

On appeal, the North Carolina Supreme Court reversed the convictions and ordered a new trial. It found that the statements had been admitted in violation of the requirements of the *Miranda* decision, noting that the respondent had refused to waive in writing his right to have counsel present and that there had not been a *specific* oral waiver. As it had in at least two earlier cases, the court read the *Miranda* opinion as

> "provid[ing] in plain language that waiver of the right to counsel during interrogation will not be recognized unless such waiver is 'specifically made' after the *Miranda* warnings have been given." 295 N. C. 250, 255, 244 S. E. 2d 410, 413 (1978).

See *State* v. *Blackmon*, 280 N. C. 42, 49–50, 185 S. E. 2d 123, 127–128 (1971); *State* v. *Thacker*, 281 N. C. 447, 453–454, 189 S. E. 2d 145, 149–150 (1972).[3]

We conclude that the North Carolina Supreme Court erred in its reading of the *Miranda* opinion. There, this Court said:

> "If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden

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[3] But see *State* v. *Siler*, 292 N. C. 543, 550, 234 S. E. 2d 733, 738 (1977). In that case, the North Carolina Supreme Court adhered to the interpretation of *Miranda* it first expressed in *Blackmon*, but acknowledged that it might find waiver without an express written or oral statement if the defendant's subsequent comments revealed that his earlier silence had been meant as a waiver. Although *Siler* was cited by the State Supreme Court in the present case, that portion of the *Siler* opinion was not discussed.

> rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." 384 U. S., at 475.

The Court's opinion went on to say:

> "An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained." *Ibid.*

Thus, the Court held that an express statement can constitute a waiver, and that silence alone after such warnings cannot do so. But the Court did not hold that such an express statement is indispensable to a finding of waiver.

An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver. The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case. As was unequivocally said in *Miranda,* mere silence is not enough. That does not mean that the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver, may never support a conclusion that a defendant has waived his rights. The courts must presume that a defendant did not waive his rights; the prosecution's burden is great; but in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated.[4]

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[4] We do not today even remotely question the holding in *Carnley* v. *Cochran,* 369 U. S. 506, which was specifically approved in the *Miranda* opinion, 384 U. S., at 475. In that case, decided before *Gideon* v. *Wainwright,* 372 U. S. 335, the Court held that the defendant had a

The Court's opinion in *Miranda* explained the reasons for the prophylactic rules it created:

> "We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored." *Id.*, at 467.

The *per se* rule that the North Carolina Supreme Court has found in *Miranda* does not speak to these concerns. There is no doubt that this respondent was adequately and effectively apprised of his rights. The only question is whether he waived the exercise of one of those rights, the right to the presence of a lawyer. Neither the state court nor the respondent has offered any reason why there must be a negative answer to that question in the absence of an *express* waiver. This is not the first criminal case to question whether a defendant waived his constitutional rights. It is an issue with which courts must repeatedly deal. Even when a right so fundamental as that to counsel at trial is involved, the question of waiver must be determined on "the particular facts and circumstances surrounding that case, including the back-

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constitutional right to counsel under the Fourteenth Amendment. The Florida Supreme Court had presumed that his right had been waived because there was no evidence in the record that he had requested counsel. The Court refused to allow a presumption of waiver from a silent record. It said: "The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer." 369 U. S., at 516. This statement is consistent with our decision today, which is merely that a court *may* find an intelligent and understanding rejection of counsel in situations where the defendant did not *expressly* state as much.

ground, experience, and conduct of the accused." *Johnson* v. *Zerbst*, 304 U. S. 458, 464. See also *United States* v. *Washington*, 431 U. S. 181, 188; *Schneckloth* v. *Bustamonte*, 412 U. S. 218; *Frazier* v. *Cupp*, 394 U. S. 731, 739.

We see no reason to discard that standard and replace it with an inflexible *per se* rule in a case such as this. As stated at the outset of this opinion, it appears that every court that has considered this question has now reached the same conclusion. Ten of the eleven United States Courts of Appeals [5] and the courts of at least 17 States [6] have held that an explicit state-

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[5] *United States* v. *Speaks*, 453 F. 2d 966 (CA1 1972); *United States* v. *Boston*, 508 F. 2d 1171 (CA2 1974); *United States* v. *Stuckey*, 441 F. 2d 1104 (CA3 1971); *Blackmon* v. *Blackledge*, 541 F. 2d 1070 (CA4 1976); *United States* v. *Hayes*, 385 F. 2d 375 (CA4 1967); *United States* v. *Cavallino*, 498 F. 2d 1200 (CA5 1974); *United States* v. *Montos*, 421 F. 2d 215 (CA5 1970); *United States* v. *Ganter*, 436 F. 2d 364 (CA7 1970); *United States* v. *Marchildon*, 519 F. 2d 337 (CA8 1975); *Hughes* v. *Swenson*, 452 F. 2d 866 (CA8 1971); *United States* v. *Moreno-Lopez*, 466 F. 2d 1205 (CA9 1972); *United States* v. *Hilliker*, 436 F. 2d 101 (CA9 1970); *Bond* v. *United States*, 397 F. 2d 162 (CA10 1968) (but see *Sullins* v. *United States*, 389 F. 2d 985 (CA10 1968)); *United States* v. *Cooper*, 163 U. S. App. D. C. 55, 499 F. 2d 1060 (1974). In *Blackmon* v. *Blackledge*, *supra*, the Court of Appeals for the Fourth Circuit specifically rejected the North Carolina Supreme Court's inflexible view that only express waivers of *Miranda* rights can be valid.

The Courts of Appeals have unanimously rejected the similar argument that refusal to sign a written waiver form precludes a finding of waiver. See *United States* v. *Speaks*, *supra*; *United States* v. *Boston*, *supra*; *United States* v. *Stuckey*, *supra*; *United States* v. *Thompson*, 417 F. 2d 196 (CA4 1969); *United States* v. *Guzman-Guzman*, 488 F. 2d 965 (CA5 1974); *United States* v. *Caulton*, 498 F. 2d 412 (CA6 1974); *United States* v. *Crisp*, 435 F. 2d 354 (CA7 1970); *United States* v. *Zamarripa*, 544 F. 2d 978 (CA8 1976); *United States* v. *Moreno-Lopez*, *supra*; *Bond* v. *United States*, *supra*; and *United States* v. *Cooper*, *supra*.

[6] *Sullivan* v. *State*, 351 So. 2d 659 (Ala. Crim. App.), cert. denied, 351 So. 2d 665 (Ala. 1977); *State* v. *Pineda*, 110 Ariz. 342, 519 P. 2d 41 (1974); *State ex rel. Berger* v. *Superior Court*, 109 Ariz. 506, 513 P. 2d 935 (1973); *People* v. *Johnson*, 70 Cal. 2d 541, 450 P. 2d 865 (1969) (reversing lower court on other grounds); *People* v. *Weaver*, 179 Colo. 331, 500 P. 2d 980 (1972);

ment of waiver is not invariably necessary to support a finding that the defendant waived the right to remain silent or the right to counsel guaranteed by the *Miranda* case. By creating an inflexible rule that no implicit waiver can ever suffice, the North Carolina Supreme Court has gone beyond the requirements of federal organic law. It follows that its judgment cannot stand, since a state court can neither add to nor subtract from the mandates of the United States Constitution. *Oregon* v. *Hass*, 420 U. S. 714.[7]

Accordingly, the judgment is vacated, and the case is remanded to the North Carolina Supreme Court for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE POWELL took no part in the consideration or decision of this case.

MR. JUSTICE BLACKMUN, concurring.

I join the opinion of the Court. My joinder, however, rests on the assumption that the Court's citation to *Johnson* v.

Reed v. *People*, 171 Colo. 421, 467 P. 2d 809 (1970); *State* v. *Craig*, 237 So. 2d 737 (Fla. 1970); *Peek* v. *State*, 239 Ga. 422, 238 S. E. 2d 12 (1977); *People* v. *Brooks*, 51 Ill. 2d 156, 281 N. E. 2d 326 (1972); *State* v. *Wilson*, 215 Kan. 28, 523 P. 2d 337 (1974); *State* v. *Hazelton*, 330 A. 2d 919 (Me. 1975); *Miller* v. *State*, 251 Md. 362, 247 A. 2d 530 (1968); *Commonwealth* v. *Murray*, 359 Mass. 541, 269 N. E. 2d 641 (1971); *State* v. *Alewine*, 474 S. W. 2d 848 (Mo. 1971); *Burnside* v. *State*, 473 S. W. 2d 697 (Mo. 1971); *Shirey* v. *State*, 520 P. 2d 701 (Okla. Crim. App. 1974); *State* v. *Davidson*, 252 Ore. 617, 451 P. 2d 481 (1969); *Commonwealth* v. *Garnett*, 458 Pa. 4, 326 A. 2d 335 (1974); *Bowling* v. *State*, 458 S. W. 2d 639 (Tenn. Crim. App. 1970); *State* v. *Young*, 89 Wash. 2d 613, 574 P. 2d 1171 (1978). See also *Aaron* v. *State*, 275 A. 2d 791 (Del. 1971); *State* v. *Nelson*, 257 N. W. 2d 356 (Minn. 1977); *Land* v. *Commonwealth*, 211 Va. 223, 176 S. E. 2d 586 (1970) (reversing lower court on other grounds).

[7] By the same token this Court must accept whatever construction of a state constitution is placed upon it by the highest court of the State.

Zerbst, 304 U. S. 458, 464 (1938), *ante*, at 374–375, is not meant to suggest that the "intentional relinquishment of a known right" formula—the formula *Zerbst* articulated for determining the waiver *vel non* "of fundamental constitutional rights," 304 U. S., at 464—has any relevance in determining whether a defendant has waived his "right to the presence of a lawyer," *ante*, at 374, under *Miranda*'s prophylactic rule.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL and MR. JUSTICE STEVENS join, dissenting.

Miranda v. *Arizona*, 384 U. S. 436, 470 (1966), held that "[n]o effective waiver of the right to counsel during interrogation can be recognized unless *specifically* made after the warnings we here delineate have been given." (Emphasis added.) Support for this holding was found in *Carnley* v. *Cochran*, 369 U. S. 506, 516 (1962), which held that in the absence of an allegation of an *"affirmative* waiver . . . there is no disputed fact question requiring a hearing." (Emphasis added.)

There is no allegation of an affirmative waiver in this case. As the Court concedes, the respondent here refused to sign the waiver form, and "said nothing when advised of his right to the assistance of a lawyer." *Ante*, at 371. Thus, there was no "disputed fact question requiring a hearing," and the trial court erred in holding one. In the absence of an "affirmative waiver" in the form of an express written or oral statement, the Supreme Court of North Carolina correctly granted a new trial. I would, therefore, affirm its decision.

The rule announced by the Court today allows a finding of waiver based upon "infer[ence] from the actions and words of the person interrogated." *Ante*, at 373. The Court thus shrouds in half-light the question of waiver, allowing courts to construct inferences from ambiguous words and gestures. But the very premise of *Miranda* requires that ambiguity be interpreted against the interrogator. That premise is the

recognition of the "compulsion inherent in custodial" interrogation, 384 U. S., at 458, and of its purpose "to subjugate the individual to the will of his examiner," *id.*, at 457. Under such conditions, only the most explicit waivers of rights can be considered knowingly and freely given.

The instant case presents a clear example of the need for an express waiver requirement. As the Court acknowledges, there is a disagreement over whether respondent was orally advised of his rights at the time he made his statement.* The fact that Butler received a written copy of his rights is deemed by the Court to be sufficient basis to resolve the disagreement. But, unfortunately, there is also a dispute over whether Butler could read. See Tr. of Oral Arg. 22, 23. And, obviously, if Butler did not have his rights read to him, and could not read them himself, there could be no basis upon which to conclude that he knowingly waived them. Indeed, even if Butler could read there is no reason to believe that his oral statements, which followed a refusal to sign a written waiver form, were intended to signify relinquishment of his rights.

Faced with "actions and words" of uncertain meaning, some judges may find waivers where none occurred. Others may fail to find them where they did. In the former case, the

*The Court states that whether Butler was orally advised of his rights at the time of the interrogation, or rather was orally advised only at the scene of the arrest, is "not relevant to the basic issue in this case." *Ante*, at 371 n. 1. But the fact that Butler received oral warnings upon his arrest in the Bronx does not establish that he understood that the same rights applied to the interrogation conducted in New Rochelle. This is particularly so since he was told at the latter that he did not have to sign the "Advice of Rights" form, but that the agent "would like for him to talk." 295 N. C. 250, 253, 244 S. E. 2d 410, 412 (1978). Indeed, the Court does not argue that the earlier oral recitation was sufficient, but rather cites in addition Butler's receipt of the written "Advice of Rights" form. However, if Butler could not read, oral warnings were the only ones that mattered, and it thus becomes highly relevant whether he was told of his rights at the time he was interrogated.

defendant's rights will have been violated; in the latter, society's interest in effective law enforcement will have been frustrated. A simple prophylactic rule requiring the police to obtain an express waiver of the right to counsel before proceeding with interrogation eliminates these difficulties. And since the Court agrees that *Miranda* requires the police to obtain some kind of waiver—whether express or implied—the requirement of an express waiver would impose no burden on the police not imposed by the Court's interpretation. It would merely make that burden explicit. Had Agent Martinez simply elicited a clear answer from Willie Butler to the question, "Do you waive your right to a lawyer?" this journey through three courts would not have been necessary.

CABAN *v.* MOHAMMED ET UX.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK

77-6431. Argued November 6, 1978—Decided April 24, 1979

Appellant and appellee Maria Mohammed lived together out of wedlock for several years in New York City, during which time two children were born. Appellant, who was identified as the father on the birth certificates, contributed to the children's support. After the couple separated, Maria took the children and married her present husband (also an appellee). During the next two years appellant frequently saw or otherwise maintained contact with the children. Appellees subsequently petitioned for adoption of the children, and appellant filed a cross-petition. The Surrogate granted appellees' petition under § 111 of the New York Domestic Relations Law, which permits an unwed mother, but not an unwed father, to block the adoption of their child simply by withholding her consent. Rejecting appellant's contention that § 111 is unconstitutional, the state appellate courts affirmed on the basis of *In re Malpica-Orsini*, 36 N. Y. 2d 568, 331 N. E. 2d 486. In that case the New York Court of Appeals held that § 111 furthered the interests of illegitimate children, for whom adoption is often the best course, reasoning that people wishing to adopt a child born out of wedlock would be discouraged if the natural father could prevent adoption merely by withholding his consent. Moreover, the court suggested that if the consent of the natural father were required, adoptions would be jeopardized because of his unavailability.

Held:

1. Contrary to appellees' contention, it is clear that § 111 treats unmarried parents differently according to their sex. The section's consent requirement is no mere formality, since the New York courts have held that the question of whether consent is required is entirely separate from the consideration of the best interests of the child. In this very case, the Surrogate held that adoption by appellant was impermissible absent Maria's consent, whereas adoption by Maria and her husband could be prevented by appellant only if he could show that such adoption would not be in the children's best interests. Pp. 387–388.

2. The sex-based distinction in § 111 between unmarried mothers and unmarried fathers violates the Equal Protection Clause of the Fourteenth Amendment because it bears no substantial relation to any important state interest. Pp. 388–394.

(a) Maternal and paternal roles are not invariably different in importance. Even if unwed mothers as a class were closer than unwed fathers to their newborn infants, the generalization concerning parent-child relations would become less acceptable to support legislative distinctions as the child's age increased. P. 389.

(b) Unwed fathers are no more likely to oppose adoption of their children than are unwed mothers. Pp. 391–392.

(c) Even if special difficulties in locating and identifying unwed fathers at birth warranted a legislative distinction between mothers and fathers of newborns, such difficulties need not persist past infancy; and in those instances where, unlike the present case, the father has not participated in the rearing of the child, nothing in the Equal Protection Clause precludes the State from withholding from him the privilege of vetoing the adoption of that child. Pp. 392–393.

43 N. Y. 2d 708, 372 N. E. 2d 42, reversed.

POWELL, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ., joined. STEWART, J., filed a dissenting opinion, *post*, p. 394. STEVENS, J., filed a dissenting opinion, in which BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 401.

Robert H. Silk argued the cause and filed briefs for appellant.

Morris Schulslaper argued the cause and filed a brief for appellees.

Irwin M. Strum, Assistant Attorney General, argued the cause for the New York State Attorney General as *amicus curiae* urging affirmance. With him on the brief were *Louis J. Lefkowitz*, Attorney General, *pro se*, *Samuel A. Hirshowitz*, First Assistant Attorney General, and *Warren M. Goidel* and *Neil S. Solon*, Assistant Attorneys General.*

MR. JUSTICE POWELL delivered the opinion of the Court.

The appellant, Abdiel Caban, challenges the constitutionality of § 111 of the New York Domestic Relations Law (Mc-

*Briefs of *amici curiae* urging reversal were filed by *Martin Guggenheim*, *Rena K. Uviller*, and *Bruce J. Ennis* for the American Civil Liberties Union; by *Louise Gruner Gans* for Community Action for Legal Services, Inc.; and by *John E. Kirklin* and *Kalman Finkel* for the Legal Aid Society of New York City.

Kinney 1977), under which two of his natural children were adopted by their natural mother and stepfather without his consent. We find the statute to be unconstitutional, as the distinction it invariably makes between the rights of unmarried mothers and the rights of unmarried fathers has not been shown to be substantially related to an important state interest.

I

Abdiel Caban and appellee Maria Mohammed lived together in New York City from September 1968 until the end of 1973. During this time Caban and Mohammed represented themselves as being husband and wife, although they never legally married. Indeed, until 1974 Caban was married to another woman, from whom he was separated. While living with the appellant, Mohammed gave birth to two children: David Andrew Caban, born July 16, 1969, and Denise Caban, born March 12, 1971. Abdiel Caban was identified as the father on each child's birth certificate, and lived with the children as their father until the end of 1973. Together with Mohammed, he contributed to the support of the family.

In December 1973, Mohammed took the two children and left the appellant to take up residence with appellee Kazin Mohammed, whom she married on January 30, 1974. For the next nine months, she took David and Denise each weekend to visit her mother, Delores Gonzales, who lived one floor above Caban. Because of his friendship with Gonzales, Caban was able to see the children each week when they came to visit their grandmother.

In September 1974, Gonzales left New York to take up residence in her native Puerto Rico. At the Mohammeds' request, the grandmother took David and Denise with her. According to appellees, they planned to join the children in Puerto Rico as soon as they had saved enough money to start a business there. During the children's stay with their grandmother, Mrs. Mohammed kept in touch with David and

Denise by mail; Caban communicated with the children through his parents, who also resided in Puerto Rico. In November 1975, he went to Puerto Rico, where Gonzales willingly surrendered the children to Caban with the understanding that they would be returned after a few days. Caban, however, returned to New York with the children. When Mrs. Mohammed learned that the children were in Caban's custody, she attempted to retrieve them with the aid of a police officer. After this attempt failed, the appellees instituted custody proceedings in the New York Family Court, which placed the children in the temporary custody of the Mohammeds and gave Caban and his new wife, Nina, visiting rights.

In January 1976, appellees filed a petition under § 110 of the New York Domestic Relations Law to adopt David and Denise.[1] In March, the Cabans cross petitioned for adoption. After the Family Court stayed the custody suit pending the outcome of the adoption proceedings, a hearing was held on the petition and cross-petition before a Law Assistant to a New York Surrogate in Kings County, N. Y. At this hearing, both the Mohammeds and the Cabans were represented by counsel and were permitted to present and cross-examine witnesses.

The Surrogate granted the Mohammeds' petition to adopt the children, thereby cutting off all of appellant's parental

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[1] Section 110 of the N. Y. Dom. Rel. Law (McKinney 1977) provides in part:

"An adult or minor husband and his adult or minor wife together may adopt a child of either of them born in or out of wedlock and an adult or minor husband or an adult or minor wife may adopt such a child of the other spouse."

Although a natural mother in New York has many parental rights without adopting her child, New York courts have held that § 110 provides for the adoption of an illegitimate child by his mother. See *In re Anonymous Adoption*, 177 Misc. 683, 31 N. Y. S. 2d 595 (Surr. Ct. 1941).

rights and obligations.[2] In his opinion, the Surrogate noted the limited right under New York law of unwed fathers in adoption proceedings: "Although a putative father's consent to such an adoption is not a legal necessity, he is entitled to an opportunity to be heard in opposition to the proposed stepfather adoption." Moreover, the court stated that the appellant was foreclosed from adopting David and Denise, as the natural mother had withheld her consent. Thus, the court considered the evidence presented by the Cabans only insofar as it reflected upon the Mohammeds' qualifications as prospective parents. The Surrogate found them well qualified and granted their adoption petition.

The New York Supreme Court, Appellate Division, affirmed. It stated that appellant's constitutional challenge to § 111 was foreclosed by the New York Court of Appeals' decision in *In re Malpica-Orsini*, 36 N. Y. 2d 568, 331 N. E. 2d 486 (1975), appeal dism'd for want of substantial federal question *sub nom. Orsini* v. *Blasi*, 423 U. S. 1042 (1976). *In re David Andrew C.*, 56 App. Div. 2d 627, 391 N. Y. S. 2d 846 (1977). The New York Court of Appeals dismissed the appeal in a

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[2] Section 117 of the N. Y. Dom. Rel. Law (McKinney 1977) provides, in part, that

"[a]fter the making of an order of adoption the natural parents of the adoptive child shall be relieved of all parental duties toward and of all responsibilities for and shall have no rights over such adoptive child or to his property by descent or succession, except as hereinafter stated."

As an exception to this general rule, § 117 provides that

"[w]hen a natural or adoptive parent, having lawful custody of a child, marries or remarries and consents that the stepfather or stepmother may adopt such child, such consent shall not relieve the parent so consenting of any parental duty toward such child nor shall such consent or the order of adoption affect the rights of such consenting spouse and such adoptive child to inherit from and through each other and the natural and adopted kindred of such consenting spouse."

In addition, § 117 (2) provides that adoption shall not affect a child's right to distribution of property under his natural parents' will.

memorandum decision based on *In re Malpica-Orsini, supra. In re David A. C.*, 43 N. Y. 2d 708, 372 N. E. 2d 42 (1977).

On appeal to this Court, appellant presses two claims. First, he argues that the distinction drawn under New York law between the adoption rights of an unwed father and those of other parents violates the Equal Protection Clause of the Fourteenth Amendment. Second, appellant contends that this Court's decision in *Quilloin* v. *Walcott*, 434 U. S. 246 (1978), recognized the due process right of natural fathers to maintain a parental relationship with their children absent a finding that they are unfit as parents.[3]

II

Section 111 of the N. Y. Dom. Rel. Law (McKinney 1977) provides in part that

> "consent to adoption shall be required as follows: . . . (b) Of the parents or surviving parent, whether adult or infant, of a child born in wedlock; [and] (c) Of the mother, whether adult or infant, of a child born out of wedlock. . . ."

The statute makes parental consent unnecessary, however, in certain cases, including those where the parent has abandoned or relinquished his or her rights in the child or has been adjudicated incompetent to care for the child.[4] Absent one of

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[3] As the appellant was given due notice and was permitted to participate as a party in the adoption proceedings, he does not contend that he was denied the procedural due process held to be requisite in *Stanley* v. *Illinois*, 405 U. S. 645 (1972).

[4] At the time of the proceedings before the Surrogate, § 111, as amended by 1975 N. Y. Laws, chs. 246 and 704, provided:

"Subject to the limitations hereinafter set forth consent to adoption shall be required as follows:

"1. Of the adoptive child, if over fourteen years of age, unless the judge or surrogate in his discretion dispenses with such consent;

"2. Of the parents or surviving parent, whether adult or infant, of a child born in wedlock;

these circumstances, an unwed mother has the authority under New York law to block the adoption of her child simply by withholding consent. The unwed father has no similar control

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"3. Of the mother, whether adult or infant, of a child born out of wedlock;

"4. Of any person or authorized agency having lawful custody of the adoptive child.

"The consent shall not be required of a parent who has abandoned the child or who has surrendered the child to an authorized agency for the purpose of adoption under the provisions of the social services law or of a parent for whose child a guardian has been appointed under the provisions of section three hundred eighty-four of the social services law or who has been deprived of civil rights or who is insane or who has been judicially declared incompetent or who is mentally retarded as defined by the mental hygiene law or who has been adjudged to be an habitual drunkard or who has been judicially deprived of the custody of the child on account of cruelty or neglect, or pursuant to a judicial finding that the child is a permanently neglected child as defined in section six hundred eleven of the family court act of the state of New York; except that notice of the proposed adoption shall be given in such manner as the judge or surrogate may direct and an opportunity to be heard thereon may be afforded to a parent who has been deprived of civil rights and to a parent if the judge or surrogate so orders. Notwithstanding any other provision of law, neither the notice of a proposed adoption nor any process in such proceeding shall be required to contain the name of the person or persons seeking to adopt the child. For the purposes of this section, evidence of insubstantial and infrequent contacts by a parent with his or her child shall not, of itself, be sufficient as a matter of law to preclude a finding that such parent has abandoned such child.

"Where the adoptive child is over the age of eighteen years the consents specified in subdivisions two and three of this section shall not be required, and the judge or surrogate in his discretion may direct that the consent specified in subdivision four of this section shall not be required if in his opinion the moral and temporal interests of the adoptive child will be promoted by the adoption and such consent cannot for any reason be obtained.

"An adoptive child who has once been lawfully adopted may be readopted directly from such child's adoptive parents in the same manner as from its natural parents. In such case the consent of such natural parents shall not be required but the judge or surrogate in his discretion

over the fate of his child, even when his parental relationship is substantial—as in this case. He may prevent the termination of his parental rights only by showing that the best interests of the child would not permit the child's adoption by the petitioning couple.

Despite the plain wording of the statute, appellees argue that unwed fathers are not treated differently under § 111 from other parents. According to appellees, the consent requirement of § 111 is merely a formal requirement, lacking in substance, as New York courts find consent to be unnecessary whenever the best interests of the child support the adoption. Because the best interests of the child always determine whether an adoption petition is granted in New York, appellees contend that all parents, including unwed fathers, are subject to the same standard.

Appellees' interpretation of § 111 finds no support in New York case law. On the contrary, the New York Court of Appeals has stated unequivocally that the question whether consent is required is entirely separate from that of the best interests of the child.[5] Indeed, the Surrogate's decision in the present case, affirmed by the New York Court of Appeals, was

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may require that notice be given to the natural parents in such manner as he may prescribe."

[5] See *In re Corey L.* v. *Martin L.*, 45 N. Y. 2d 383, 391, 380 N. E. 2d 266, 270 (1978):

"Absent consent, the first focus here was on the issue of abandonment since neither decisional rule nor statute can bring the relationship to an end because someone else might rear the child in a more satisfactory fashion . . . . Abandonment, as it pertains to adoption, relates to such conduct on the part of a parent as evinces a purposeful ridding of parental obligations and the foregoing of parental rights—a withholding of interest, presence, affection, care and support. The best interests of the child, as such, is not an ingredient of that conduct and is not involved in this threshold question. While promotion of the best interests of the child is essential to ultimate approval of the adoption application, such interests cannot act as a substitute for a finding of abandonment." (Citations omitted.)

based upon the assumption that there was a distinctive difference between the rights of Abdiel Caban, as the unwed father of David and Denise, and Maria Mohammed, as the unwed mother of the children: Adoption by Abdiel was held to be impermissible in the absence of Maria's consent, whereas adoption by Maria could be prevented by Abdiel only if he could show that the Mohammeds' adoption of the children would not be in the children's best interests. Accordingly, it is clear that § 111 treats unmarried parents differently according to their sex.[6]

III

Gender-based distinctions "must serve important governmental objectives and must be substantially related to achievement of those objectives" in order to withstand judicial scrutiny under the Equal Protection Clause. *Craig* v. *Boren*, 429 U. S. 190, 197 (1976). See also *Reed* v. *Reed*, 404 U. S. 71 (1971). The question before us, therefore, is whether the distinction in § 111 between unmarried mothers and unmarried fathers bears a substantial relation to some important state interest. Appellees assert that the distinction is justified by a fundamental difference between maternal and paternal relations—that "a natural mother, absent special circumstances, bears a closer relationship with her child . . . than a father does." Tr. of Oral Arg. 41.

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[6] The dissents speculate that the sex-based distinction of § 111 might not apply to those unwed fathers who obtain legal custody of their children. See *post*, at 395, and at 412–413, n. 23. But no New York court has so ruled. Indeed, one court has indicated that, at least with respect to legitimate children, the provision in § 111 (4) giving legal guardians a veto over the adoption of their wards applies only if the natural parents are dead. See *In re Mendelsohn's Adoption*, 180 Misc. 147, 149, 39 N. Y. S. 2d 384, 386 (Surr. Ct. 1943). We should not overlook, therefore, the New York courts' exclusive reliance upon § 111 (3) and instead speculate whether, if Caban had sought and obtained legal custody of his children, his legal rights would have been different under New York law.

Contrary to appellees' argument and to the apparent presumption underlying § 111, maternal and paternal roles are not invariably different in importance. Even if unwed mothers as a class were closer than unwed fathers to their newborn infants, this generalization concerning parent-child relations would become less acceptable as a basis for legislative distinctions as the age of the child increased. The present case demonstrates that an unwed father may have a relationship with his children fully comparable to that of the mother. Appellant Caban, appellee Maria Mohammed, and their two children lived together as a natural family for several years. As members of this family, both mother and father participated in the care and support of their children.[7] There is no reason to believe that the Caban children—aged 4 and 6 at the time of the adoption proceedings—had a relationship with their mother unrivaled by the affection and concern of their father. We reject, therefore, the claim that the broad, gender-based distinction of § 111 is required by any universal difference between maternal and paternal relations at every phase of a child's development.

As an alternative justification for § 111, appellees argue that the distinction between unwed fathers and unwed mothers is substantially related to the State's interest in promoting the adoption of illegitimate children. Although the legislative

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[7] In rejecting an unmarried father's constitutional claim in *Quilloin* v. *Walcott*, 434 U. S. 246 (1978), we emphasized the importance of the appellant's failure to act as a father toward his children, noting that he "has never exercised actual or legal custody over his child, and thus has never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child. Appellant does not complain of his exemption from these responsibilities and, indeed, he does not even now seek custody of his child." *Id.*, at 256.

In *Quilloin* we expressly reserved the question whether the Georgia statute similar to § 111 of the New York Domestic Relations Law unconstitutionally distinguished unwed parents according to their gender, as the claim was not properly presented. See 434 U. S., at 253 n. 13.

history of § 111 is sparse,[8] in *In re Malpica-Orsini*, 36 N. Y. 2d 568, 331 N. E. 2d 486 (1975), the New York Court of Appeals identified as the legislature's purpose in enacting § 111 the furthering of the interests of illegitimate children, for whom adoption often is the best course.[9] The court concluded:

> "To require the consent of fathers of children born out of wedlock . . . , or even some of them, would have the overall effect of denying homes to the homeless and of depriving innocent children of the other blessings of adoption. The cruel and undeserved out-of-wedlock stigma would continue its visitations. At the very least, the worthy process of adoption would be severely impeded." 36 N. Y. 2d, at 572, 331 N. E. 2d, at 489.

The court reasoned that people wishing to adopt a child born out of wedlock would be discouraged if the natural father could prevent the adoption by the mere withholding of his consent. Indeed, the court went so far as to suggest that "[m]arriages would be discouraged because of the reluctance of prospective husbands to involve themselves in a family sit-

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[8] Consent of the unmarried father has never been required for adoption under New York law, although parental consent otherwise has been required at least since the late 19th century. See, *e. g.*, 1896 N. Y. Laws, ch. 272. There are no legislative reports setting forth the reasons why the New York Legislature excepted unmarried fathers from the general requirement of parental consent for adoption.

[9] In *Orsini* v. *Blasi*, 423 U. S. 1042 (1976), the Court dismissed an appeal from the New York Court of Appeals challenging the constitutionality of § 111 as applied to an unmarried father whose child had been ordered adopted by a New York Family Court. In dismissing the appeal, we indicated that a substantial federal question was lacking. This was a ruling on the merits, and therefore is entitled to precedential weight. See *Hicks* v. *Miranda*, 422 U. S. 332, 344 (1975). At the same time, however, our decision not to review fully the questions presented in *Orsini* v. *Blasi* is not entitled to the same deference given a ruling after briefing, argument, and a written opinion. See *Edelman* v. *Jordan*, 415 U. S. 651, 671 (1974). Insofar as our decision today is inconsistent with our dismissal in *Orsini*, we overrule our prior decision.

uation where they might only be a foster parent and could not adopt the mother's offspring." *Id.*, at 573, 331 N. E. 2d, at 490. Finally, the court noted that if unwed fathers' consent were required before adoption could take place, in many instances the adoption would have to be delayed or eliminated altogether, because of the unavailability of the natural father.[10]

The State's interest in providing for the well-being of illegitimate children is an important one. We do not question that the best interests of such children often may require their adoption into new families who will give them the stability of a normal, two-parent home. Moreover, adoption will remove the stigma under which illegitimate children suffer. But the unquestioned right of the State to further these desirable ends by legislation is not in itself sufficient to justify the gender-based distinction of § 111. Rather, under the relevant cases applying the Equal Protection Clause it must be shown that the distinction is structured reasonably to further these ends. As we repeated in *Reed* v. *Reed*, 404 U. S., at 76, such a statutory "classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' *Royster Guano Co.* v. *Virginia*, 253 U. S. 412, 415 (1920)."

We find that the distinction in § 111 between unmarried mothers and unmarried fathers, as illustrated by this case, does not bear a substantial relation to the State's interest in providing adoptive homes for its illegitimate children. It may be that, given the opportunity, some unwed fathers would prevent the adoption of their illegitimate children. This impediment to adoption usually is the result of a natural

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[10] In his brief as *amicus curiae*, the New York Attorney General echoes the New York Court of Appeals' exposition in *In re Malpica-Orsini* of the interests promoted by § 111's different treatment of unmarried fathers. See Brief for New York Attorney General as *Amicus Curiae* 16–20.

parental interest shared by both genders alike; it is not a manifestation of any profound difference between the affection and concern of mothers and fathers for their children. Neither the State nor the appellees have argued that unwed fathers are more likely to object to the adoption of their children than are unwed mothers; nor is there any self-evident reason why as a class they would be.

The New York Court of Appeals in *In re Malpica-Orsini, supra,* suggested that the requiring of unmarried fathers' consent for adoption would pose a strong impediment for adoption because often it is impossible to locate unwed fathers when adoption proceedings are brought, whereas mothers are more likely to remain with their children. Even if the special difficulties attendant upon locating and identifying unwed fathers at birth would justify a legislative distinction between mothers and fathers of newborns,[11] these difficulties need not persist past infancy. When the adoption of an older child is sought, the State's interest in proceeding with adoption cases can be protected by means that do not draw such an inflexible gender-based distinction as that made in § 111.[12] In those cases where the father never has come forward to participate in the rearing of his child, nothing in the Equal Protection Clause precludes the State from withholding from him the privilege of vetoing the adoption of that child. Indeed, under the statute as it now stands the surrogate may proceed in the absence of consent when the parent whose consent otherwise would be required never has come forward or has abandoned the child.[13] See, *e. g., In re Orlando F.,* 40 N. Y. 2d 103, 351

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[11] Because the question is not before us, we express no view whether such difficulties would justify a statute addressed particularly to newborn adoptions, setting forth more stringent requirements concerning the acknowledgment of paternity or a stricter definition of abandonment.

[12] See Comment, The Emerging Constitutional Protection of the Putative Father's Parental Rights, 70 Mich. L. Rev. 1581, 1590 (1972).

[13] If the New York Court of Appeals is correct that unmarried fathers often desert their families (a view we need not question), then allowing

N. E. 2d 711 (1976). But in cases such as this, where the father has established a substantial relationship with the child and has admitted his paternity,[14] a State should have no difficulty in identifying the father even of children born out of wedlock.[15] Thus, no showing has been made that the different treatment afforded unmarried fathers and unmarried mothers under § 111 bears a substantial relationship to the proclaimed interest of the State in promoting the adoption of illegitimate children.

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those fathers who remain with their families a right to object to the termination of their parental rights will pose little threat to the State's ability to order adoption in most cases. For we do not question a State's right to do what New York has done in this portion of § 111: provide that fathers who have abandoned their children have no right to block adoption of those children.

We do not suggest, of course, that the provision of § 111 making parental consent unnecessary in cases of abandonment is the only constitutional mechanism available to New York for the protection of its interest in allowing the adoption of illegitimate children when their natural fathers are not available to be consulted. In reviewing the constitutionality of statutory classifications, "it is not the function of a court 'to hypothesize independently on the desirability or feasibility of any possible alternative[s]' to the statutory scheme formulated by [the State]." *Lalli* v. *Lalli,* 439 U. S. 259, 274 (1978) (quoting *Mathews* v. *Lucas,* 427 U. S. 495, 515 (1976)). We note some alternatives to the gender-based distinction of § 111 only to emphasize that the state interests asserted in support of the statutory classification could be protected through numerous other mechanisms more closely attuned to those interests.

[14] In *Quilloin* v. *Walcott,* 434 U. S. 246 (1978), we noted the importance in cases of this kind of the relationship that in fact exists between the parent and child. See n. 7, *supra.*

[15] States have a legitimate interest, of course, in providing that an unmarried father's right to object to the adoption of a child will be conditioned upon his showing that it is in fact his child. Cf. *Lalli* v. *Lalli, supra,* at 268–269. Such is not, however, the import of the New York statute here. Although New York provides for actions in its Family Courts to establish paternity, see N. Y. Family Court Act §§ 511 to 571 (McKinney 1975 and Supp. 1978–1979), there is no provision allowing men who have been determined by the court to be the father of a child born out of wedlock to object to the adoption of their children under § 111.

In sum, we believe that § 111 is another example of "overbroad generalizations" in gender-based classifications. See *Califano* v. *Goldfarb*, 430 U. S. 199, 211 (1977); *Stanton* v. *Stanton*, 421 U. S. 7, 14–15 (1975). The effect of New York's classification is to discriminate against unwed fathers even when their identity is known and they have manifested a significant paternal interest in the child. The facts of this case illustrate the harshness of classifying unwed fathers as being invariably less qualified and entitled than mothers to exercise a concerned judgment as to the fate of their children. Section 111 both excludes some loving fathers from full participation in the decision whether their children will be adopted and, at the same time, enables some alienated mothers arbitrarily to cut off the paternal rights of fathers. We conclude that this undifferentiated distinction between unwed mothers and unwed fathers, applicable in all circumstances where adoption of a child of theirs is at issue, does not bear a substantial relationship to the State's asserted interests.[16]

The judgment of the New York Court of Appeals is

Reversed.

MR. JUSTICE STEWART, dissenting.

For reasons similar to those expressed in the dissenting opinion of MR. JUSTICE STEVENS, I agree that § 111 (1)(c) of

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[16] Appellant also challenges the constitutionality of the distinction made in § 111 between married and unmarried fathers. As we have resolved that the sex-based distinction of § 111 violates the Equal Protection Clause, we need express no view as to the validity of this additional classification.

Finally, appellant argues that he was denied substantive due process when the New York courts terminated his parental rights without first finding him to be unfit to be a parent. See *Stanley* v. *Illinois*, 405 U. S. 645 (1972) (semble). Because we have ruled that the New York statute is unconstitutional under the Equal Protection Clause, we similarly express no view as to whether a State is constitutionally barred from ordering adoption in the absence of a determination that the parent whose rights are being terminated is unfit.

the New York Domestic Relations Law (McKinney 1977) is not constitutionally infirm. The State's interest in promoting the welfare of illegitimate children is of far greater importance than the opinion of the Court would suggest. Unlike the children of married parents, illegitimate children begin life with formidable handicaps. They typically depend upon the care and economic support of only one parent—usually the mother. And, even in this era of changing mores, they still may face substantial obstacles simply because they are illegitimate. Adoption provides perhaps the most generally available way of removing these handicaps. See H. Clark, Law of Domestic Relations 177 (1968). Most significantly, it provides a means by which an illegitimate child can become legitimate—a fact that the Court's opinion today barely acknowledges.

The New York statute reflects the judgment that, to facilitate this ameliorative change in the child's status, the consent of only one parent should ordinarily be required for adoption of a child born out of wedlock. The mother has been chosen as the parent whose consent is indispensable. A different choice would defy common sense. But the unwed father, if he is the lawful custodian of the child, must under the statute also consent.* And, even when he does not have custody, the unwed father who has an established relationship with his illegitimate child is not denied the opportunity to participate in the adoption proceeding. His relationship with the child will be terminated through adoption only if a court determines that adoption will serve the child's best interest. These distinctions represent, I think, a careful accommodation of the competing interests at stake and bear a close and substantial relationship to the State's goal of promoting the welfare of its children. In my view, the Constitution requires no more.

The appellant has argued that the statute, in granting

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*New York Dom. Rel. Law § 111 (1)(d) (McKinney 1977) requires the consent of "any person or authorized agency having lawful custody of the adoptive child."

rights to an unwed mother that it does not grant to an unwed father, violates the Equal Protection Clause by discriminating on the basis of gender. And he also has made the argument that the statute, because it withholds from the unwed father substantive rights granted to all other classes of parents, violates both the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment. I find the latter contention less troublesome than does my Brother STEVENS, and see no ultimate merit in the former.

A

The appellant relies primarily on *Stanley* v. *Illinois*, 405 U. S. 645, in advancing the second argument identified above. But it is obvious that the principle established in that case is not offended by the New York law. The Illinois statute invalidated in *Stanley* employed a stark and absolute presumption that the unwed father was not a fit parent. Upon the death of the unwed mother, the children were declared wards of the State and in Stanley's case were removed from his custody without any hearing or demonstration that he was not a fit parent. Custody having been taken from the father by a stranger—the State—the children were then transferred to other strangers. Stanley, who had lived with his three children over a period of 18 years, was given no opportunity to object. And, although the statute purported to promote the welfare of illegitimate children, the State's termination of Stanley's family relationship was made without any finding that the interests of his children would thereby be served.

Here, in sharp contrast, the unwed mother is alive, has married, and has voluntarily initiated the adoption proceeding. The appellant has been given the opportunity to participate and to present evidence on the question whether adoption would be in the best interests of the children. Thus, New York has accorded to the appellant all the process that Illinois unconstitutionally denied to Stanley.

The Constitution does not require that an unmarried father's substantive parental rights must always be coextensive with those afforded to the fathers of legitimate children. In this setting, it is plain that the absence of a legal tie with the mother provides a constitutionally valid ground for distinction. The decision to withhold from the unwed father the power to veto an adoption by the natural mother and her husband may well reflect a judgment that the putative father should not be able arbitrarily to withhold the benefit of legitimacy from his children.

Even if it be assumed that each married parent after divorce has some substantive due process right to maintain his or her parental relationship, cf. *Smith* v. *Organization of Foster Families*, 431 U. S. 816, 862–863 (opinion concurring in judgment), it by no means follows that each unwed parent has any such right. Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring. The mother carries and bears the child, and in this sense her parental relationship is clear. The validity of the father's parental claims must be gauged by other measures. By tradition, the primary measure has been the legitimate familial relationship he creates with the child by marriage with the mother. By definition, the question before us can arise only when no such marriage has taken place. In some circumstances the actual relationship between father and child may suffice to create in the unwed father parental interests comparable to those of the married father. Cf. *Stanley* v. *Illinois*, *supra*. But here we are concerned with the rights the unwed father may have when his wishes and those of the mother are in conflict, and the child's best interests are served by a resolution in favor of the mother. It seems to me that the absence of a legal tie with the mother may in such circumstances appropriately place a limit on whatever substantive constitutional claims might otherwise exist by virtue of the father's actual relationship with the children.

B

The appellant's equal protection challenge to the distinction drawn between the unwed father and mother seems to me more substantial. Gender, like race, is a highly visible and immutable characteristic that has historically been the touchstone for pervasive but often subtle discrimination. Although the analogy to race is not perfect and the constitutional inquiry therefore somewhat different, gender-based statutory classifications deserve careful constitutional examination because they may reflect or operate to perpetuate mythical or stereotyped assumptions about the proper roles and the relative capabilities of men and women that are unrelated to any inherent differences between the sexes. Cf. *Orr* v. *Orr*, 440 U. S. 268. Sex-based classifications are in many settings invidious because they relegate a person to the place set aside for the group on the basis of an attribute that the person cannot change. *Reed* v. *Reed*, 404 U. S. 71; *Stanton* v. *Stanton*, 421 U. S. 7; *Frontiero* v. *Richardson*, 411 U. S. 677; *Weinberger* v. *Wiesenfeld*, 420 U. S. 636; *Orr* v. *Orr*, *supra*. Such laws cannot be defended, as can the bulk of the classifications that fill the statute books, simply on the ground that the generalizations they reflect may be true of the majority of members of the class, for a gender-based classification need not ring false to work a discrimination that in the individual case might be invidious. Nonetheless, gender-based classifications are not invariably invalid. When men and women are not in fact similarly situated in the area covered by the legislation in question, the Equal Protection Clause is not violated. See, *e. g.*, *Schlesinger* v. *Ballard*, 419 U. S. 498. Cf. *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S. 1, 59 (concurring opinion).

In my view, the gender-based distinction drawn by New York falls in this latter category. With respect to a large group of adoptions—those of newborn children and infants—unwed mothers and unwed fathers are simply not similarly

situated, as my Brother STEVENS has demonstrated. Our law has given the unwed mother the custody of her illegitimate children precisely because it is she who bears the child and because the vast majority of unwed fathers have been unknown, unavailable, or simply uninterested. See H. Clark, Law of Domestic Relations 176–177 (1968); H. Krause, Illegitimacy: Law and Social Policy 29–32 (1971). This custodial preference has carried with it a correlative power in the mother to place her child for adoption or not to do so.

The majority of the States have incorporated these basic common-law rules in their statutes identifying the persons whose participation or consent is requisite to a valid adoption. See generally Note, 59 Va. L. Rev. 517 (1973); Comment, 70 Mich. L. Rev. 1581 (1972). These common-law and statutory rules of law reflect the physical reality that only the mother carries and gives birth to the child, as well as the undeniable social reality that the unwed mother is always an identifiable parent and the custodian of the child—until or unless the State intervenes. The biological father, unless he has established a familial tie with the child by marrying the mother, is often a total stranger from the State's point of view. I do not understand the Court to question these pragmatic differences. See *ante*, at 392. An unwed father who has not come forward and who has established no relationship with the child is plainly not in a situation similar to the mother's. New York's consent distinctions have clearly been made on this basis, and in my view they do not violate the Equal Protection Clause of the Fourteenth Amendment. See *Schlesinger* v. *Ballard*, *supra*.

In this case, of course, we are concerned not with an unwilling or unidentified father but instead with an unwed father who has established a paternal relationship with his children. He is thus similarly situated to the mother, and his claim is that he thus has parental interests no less deserving of protection than those of the mother. His contention that the New York

law in question consequently discriminates against him on the basis of gender cannot be lightly dismissed. For substantially the reasons expressed by MR. JUSTICE STEVENS in his dissenting opinion, *post*, at 412–413, I believe, however, that this gender-based distinction does not violate the Equal Protection Clause as applied in the circumstances of the present case.

It must be remembered that here there are not two, but three interests at stake: the mother's, the father's, and the children's. Concerns humane as well as practical abundantly support New York's provision that only one parent need consent to the adoption of an illegitimate child, though it requires both parents to consent to the adoption of one already legitimate. If the consent of both unwed parents were required, and one withheld that consent, the illegitimate child would remain illegitimate. Viewed in these terms the statute does not in any sense discriminate on the basis of sex. The question, then, is whether the decision to select the unwed mother as the parent entitled to give or withhold consent and to apply that rule even when the unwed father in fact has a paternal relationship with his children constitutes invidious sex-based discrimination.

The appellant's argument would be a powerful one were this an instance in which it had been found that adoption by the father would serve the best interests of the children, and in the face of that finding the mother had been permitted to block the adoption. But this is not such a case. As my Brother STEVENS has observed, under a sex-neutral rule—assuming that New York is free to require the consent of but one parent for the adoption of an illegitimate child—the outcome in this case would have been the same. The appellant has been given the opportunity to show that an adoption would not be in his children's best interests. Implicit in the finding made by the New York courts is the judgment that termination of his relationship with the children will in fact promote their well-being—a judgment we are obligated to accept.

That the statute might permit—in a different context—the unwed mother arbitrarily to thwart the wishes of the caring father as well as the best interests of the child is not a sufficient reason to invalidate it as applied in the present case. For here the legislative goal of the statute—to facilitate adoptions that are in the best interests of illegitimate children after consideration of all other interests involved—has indeed been fully and fairly served by this gender-based classification. Unless the decision to require the consent of only one parent is in itself constitutionally defective, which nobody has argued, the same interests that support that decision are sufficiently profound to overcome the appellant's claim that he has been invidiously discriminated against because he is a male.

I agree that retroactive application of the Court's decision today would work untold harm, and I fully subscribe to Part III of MR. JUSTICE STEVENS' dissent.

MR. JUSTICE STEVENS, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, dissenting.

Under § 111 (1)(c) of the New York Domestic Relations Law (McKinney 1977), the adoption of a child born out of wedlock usually requires the consent of the natural mother; it does not require that of the natural father unless he has "lawful custody." See *ante*, at 386 n. 4. Appellant, the natural but noncustodial father of two school-age children born out of wedlock,[1] challenges that provision insofar as it allows the adoption of his natural children by the husband of the natural mother without his consent. Appellant's primary objection is that this unconsented-to termination of his parental rights without proof of unfitness on his part violates the substantive component of the Due Process Clause of the Fourteenth Amendment. Secondarily, he attacks § 111 (1)(c)'s dis-

[1] The children are presently 8 and 9 years old. At the time of the hearing before the Surrogate Court, they were 5 and 6.

parate treatment of natural mothers and natural fathers as a violation of the Equal Protection Clause of the same Amendment. In view of the Court's disposition, I shall discuss the equal protection question before commenting on appellant's primary contention. I shall then indicate why I think the holding of the Court, although erroneous, is of limited effect.

I

This case concerns the validity of rules affecting the status of the thousands of children who are born out of wedlock every day.[2] All of these children have an interest in acquiring the status of legitimacy; a great many of them have an interest in being adopted by parents who can give them opportunities that would otherwise be denied; for some the basic necessities of life are at stake. The state interest in facilitating adoption in appropriate cases is strong—perhaps even "compelling."[3]

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[2] Illegitimate births accounted for an estimated 14.7% and 15.5% of all births in the United States during the years 1976 and 1977, respectively. See U. S. Dept. of HEW, National Center for Health Statistics, 27 Vital Statistics Report, No. 11, p. 19 (1979); 26 Vital Statistics Report, No. 12, p. 17 (1978). In total births, this represents 468,100 and 515,700 illegitimate births, respectively. Although statistics for New York State are not available, the problem of illegitimacy appears to be especially severe in urban areas. For example, in 1975, over 50% of all births in the District of Columbia were out of wedlock. U. S. Dept. of HEW, National Center for Health Statistics, 1 Vital Statistics of the United States, 1975 (Natality), 50 (1978).

Adoption is an important solution to the problem of illegitimacy. Thus, about 70% of the adoptions in the 34 States reporting to HEW in 1975 were of children born out of wedlock. The figure for New York State was 78%. U. S. Dept. of HEW, National Center for Social Statistics, Adoptions in 1975, p. 11 (1977) (hereinafter Adoptions in 1975).

[3] The reason I say "perhaps" is that the word "compelling" can be understood in different ways. If it describes an interest that "compels" a conclusion that any statute intended to foster that interest is automatically constitutional, few if any interests would fit that description. On the other hand, if it merely describes an interest that compels a court,

Nevertheless, it is also true that § 111 (1)(c) gives rights to natural mothers that it withholds from natural fathers. Because it draws this gender-based [4] distinction between two classes of citizens who have an equal right to fair and impartial treatment by their government, it is necessary to determine whether there are differences between the members of the two classes that provide a justification for treating them differently.[5] That determination requires more than merely recognizing that society has traditionally treated the two classes differently.[6] But it also requires analysis that goes beyond a merely reflexive rejection of gender-based distinctions.

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before holding a law unconstitutional, to give thoughtful attention to a legislative judgment that the law will serve that interest, then the State's interest in facilitating adoption in appropriate cases is unquestionably compelling. See *Smith* v. *Organization of Foster Families*, 431 U. S. 816, 844, and n. 51; *id.*, at 861–862 (STEWART, J., concurring in judgment); *Weber* v. *Aetna Casualty & Surety Co.*, 406 U. S. 164, 175; *Stanley* v. *Illinois*, 405 U. S. 645, 652; *In re Malpica-Orsini*, 36 N. Y. 2d 568, 571–574, 331 N. E. 2d 486, 488–491 (1975).

[4] Although not all men are included in the disadvantaged class, since under § 111 (1)(b) *married* fathers are given consent rights, it is nonetheless true that but for their gender the members of that class would not be disadvantaged. Hence, it is not possible to avoid the conclusion that the classification here is one based on gender. See *Los Angeles Dept. of Water & Power* v. *Manhart*, 435 U. S. 702, 711.

[5] Section 111 treats illegitimate children somewhat differently from legitimate ones insofar as the former, but not the latter, may be removed from one or both of their natural parents and placed in an adoptive home without the consent of *both* parents. Nonetheless, appellant has not challenged the statute on this basis either on his or his children's behalf, and the difficult questions that might be raised by such a challenge, compare *Lalli* v. *Lalli*, 439 U. S. 259, with *Trimble* v. *Gordon*, 430 U. S. 762, are not now before us.

[6] "For a traditional classification is more likely to be used without pausing to consider its justification than is a newly created classification. Habit, rather than analysis, makes it seem acceptable and natural to distinguish between male and female, alien and citizen, legitimate and illegitimate; for too much of our history there was the same inertia in distinguishing between black and white. But that sort of stereotyped reaction

Men and women are different, and the difference is relevant to the question whether the mother may be given the exclusive right to consent to the adoption of a child born out of wedlock. Because most adoptions involve newborn infants or very young children,[7] it is appropriate at the outset to focus on the significance of the difference in such cases.

Both parents are equally responsible for the conception of the child out of wedlock.[8] But from that point on through pregnancy and infancy, the differences between the male and the female have an important impact on the child's destiny. Only the mother carries the child; it is she who has the constitutional right to decide whether to bear it or not.[9] In many

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may have no rational relationship—other than pure prejudicial discrimination—to the stated purpose for which the classification is being made." *Mathews* v. *Lucas*, 427 U. S. 495, 520–521 (STEVENS, J., dissenting).

[7] The relevant statistics for New York are not complete. The most comprehensive ones that we have found are for the years 1974 and 1975. Even for those years, however, we could find none that include a breakdown by age of the adoptive children where one of the adoptive parents is in some way related to the child. (New York adoptions by related parents—including ones by relatives other than a natural parent and stepparent—accounted for just over half of all adoptions in 1974 and just under half in 1975.) Nonetheless, of the children adopted by unrelated parents in New York in 1974 and 1975, respectively, 66% and 62% were under 1 year old, and 90% and 88% were under 6 years old. In 1974, moreover, the median age of the child at the time of adoption was 5 months; no similar figure is available for 1975. New York's figures appear to be fairly close to those obtaining nationally. U. S. Dept. of HEW, National Center for Statistics, Adoptions in 1974, pp. 15–16 (1976); Adoptions in 1975, p. 15.

[8] Of course, this is not true in every individual case, or perhaps in most cases. Nevertheless, for purposes of equal protection analysis, it probably should be assumed that in the class of cases in which the parties are not equally responsible, the woman has been the aggressor about as often as the man. If this assumption is doubted on the ground that the adverse consequences of conception out of wedlock typically make the woman more cautious because those consequences are more serious for her, that doubt merely reinforces the basic analysis set forth in the text.

[9] See *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U. S. 52, 67–75.

cases, only the mother knows who sired the child, and it will often be within her power to withhold that fact, and even the fact of her pregnancy, from that person. If during pregnancy the mother should marry a different partner, the child will be legitimate when born, and the natural father may never even know that his "rights" have been affected. On the other hand, only if the natural mother agrees to marry the natural father during that period can the latter's actions have a positive impact on the status of the child; if he instead should marry a different partner during that time, the only effect on the child is negative, for the likelihood of legitimacy will be lessened.

These differences continue at birth and immediately thereafter. During that period, the mother and child are together; [10] the mother's identity is known with certainty. The father, on the other hand, may or may not be present; his identity may be unknown to the world and may even be uncertain to the mother.[11] These natural differences between unmarried fathers and mothers make it probable that the mother, and not the father or both parents, will have custody of the newborn infant.[12]

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[10] In fact, there is some sociological and anthropological research indicating that by virtue of the symbiotic relationship between mother and child during pregnancy and the initial contact between mother and child directly after birth a physical and psychological bond immediately develops between the two that is not then present between the infant and the father or any other person. *E. g.*, 1 & 2 J. Bowlby, Attachment and Loss (1969, 1973); M. Mahler, The Psychological Birth of the Human Infant (1975).

[11] The Court has frequently noted the difficulty of proving paternity in cases involving illegitimate children. *E. g.*, *Trimble* v. *Gordon, supra,* at 770–771; *Gomez* v. *Perez,* 409 U. S. 535, 538. Indeed, these proof problems have been relied upon to justify differential treatment not only of unwed mothers and fathers but also of legitimate and illegitimate children. *Parham* v. *Hughes, ante,* at 357–358 (plurality opinion); *Lalli* v. *Lalli, supra,* at 268–269 (plurality opinion).

[12] Although statistics are hard to find in this area, those I have found bear out the proposition that is developed in text as a logical matter. Thus, in "relinquishment adoptions" in California in 1975, natural moth-

In short, it is virtually inevitable that from conception through infancy the mother will constantly be faced with decisions about how best to care for the child, whereas it is much less certain that the father will be confronted with comparable problems. There no doubt are cases in which the relationship of the parties at birth makes it appropriate for the State to give the father a voice of some sort in the adoption decision.[13] But as a matter of equal protection analysis,

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ers signed the "relinquishment" documents—papers that release custody of the child to an adoption agency and that must be signed by the parent(s) with custody, or by a judge in cases involving neglect or abandonment by the parent(s) who previously had custody—in 69% of the cases, while natural fathers did so in only 36% of the cases. On the other hand, fathers took *no* part in over 28% of the relinquishment adoptions, apparently because they never had custody, while the comparable figure for mothers was 3.5%. California Health and Welfare Agency, Characteristics of Relinquishment Adoptions in California, 1970–1975, Tables 11 and 12 (1978).

[13] Cf. Part II, *infra*. Indeed, New York does give unwed fathers ample opportunity to participate in adoption proceedings. In this case, for example, appellant appeared at the adoption hearing with counsel, presented testimony, and was allowed to cross-examine the witnesses offered by appellees. See N. Y. Dom. Rel. Law § 111–a (McKinney 1977 and Supp. 1978–1979); App. 27; *ante*, at 383. As a substantive matter, the natural father is free to demonstrate, as appellant unsuccessfully tried to do in this case, that the best interests of the child favor the preservation of existing parental rights and forestall cutting off those rights by way of adoption. Had appellant been able to make that demonstration, the result would have been the same as that mandated by the Court's insistence upon paternal as well as maternal consent in these circumstances: neither parent could adopt the child into a new family with a stepparent; both would have parental rights (*e. g.*, visitation); and custody would be determined by the child's best interests.

In this case, although the New York courts made no finding of unfitness on appellant's part, there was ample evidence in the record from which they could draw the conclusion that his relationship with the children had been somewhat intermittent, that it fell far short of the relationship existing between the mother and the children (whether measured by the amount of time spent with the children, the responsibility taken

it is perfectly obvious that at the time and immediately after a child is born out of wedlock, differences between men and women justify some differential treatment of the mother and father in the adoption process.

Most particularly, these differences justify a rule that gives the mother of the newborn infant the exclusive right to consent to its adoption. Such a rule gives the mother, in whose sole charge the infant is often placed anyway, the maximum flexibility in deciding how best to care for the child. It also gives the loving father an incentive to marry the mother,[14] and has no adverse impact on the disinterested father. Finally, it facilitates the interests of the adoptive parents, the child, and the public at large by streamlining the often traumatic adoption process and allowing the prompt, complete, and reliable integration of the child into a satisfac-

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for their care and education, or the amount of resources expended on them), and that judging from appellant's treatment of his first wife and his children by that marriage, there was a real possibility that he could not be counted on for the continued support of the two children and might well be a source of friction between them, the mother, and her new husband. *E. g.*, App. 22, 25; Tr. 4–7, 12–20, 36, 50, 70 (Mar. 19, 1976); Tr. 130–135, 156–157, 162–163 (Apr. 30, 1976).

That conclusion, coupled with the Surrogate's finding that the mother's marriage to the adoptive father was "solid and permanent" and that the children were "well cared for and healthy" in the new family, App. 30, surely justifies the Surrogate's ultimate conclusion that the legitimacy and stability to be gained by the children from the adoption far outweighed their loss (and even appellant's) due to the termination of appellant's parental rights. See *id.*, at 28:

"Whatever the motive for [appellant's] opposition to the adoption, the consequences are the same—harassment of the natural mother in her new relationship and embarrassment to [the children] who though living with and being supported in the new family may not in school and elsewhere bear the family name."

[14] Marrying the mother would not only legitimate the child but would also assure the father the right to consent to any adoption. See N. Y. Dom. Rel. Law § 111 (1)(b) (McKinney 1977).

tory new home at as young an age as is feasible.[15] Put most simply, it permits the maximum participation of interested natural parents without so burdening the adoption process that its attractiveness to potential adoptive parents is destroyed.

This conclusion is borne out by considering the alternative rule proposed by appellant. If the State were to require the consent of both parents, or some kind of hearing to explain why either's consent is unnecessary or unobtainable,[16] it would unquestionably complicate and delay the adoption process. Most importantly, such a rule would remove the mother's freedom of choice in her own and the child's behalf without also relieving her of the unshakable responsibility for the care of the child. Furthermore, questions relating to the adequacy of notice to absent fathers could invade the mother's privacy,[17] cause the adopting parents to doubt the reliability

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[15] These are not idle interests. A survey of adoptive parents registered on the New York State Adoption Exchange as of January 1975 showed that over 75% preferred to adopt children under 3 years old; over half preferred children under 1 year old. New York Department of Social Services, Adoption in New York State 20 (Program Analysis Report No. 59, July 1975). Moreover, adoption proceedings, even when judicial in nature, have traditionally been expeditious in order to accommodate the needs of all concerned. Thus, 61% of all Family Court adoption proceedings in New York during the fiscal year 1972–1973 were disposed of within 90 days. Nineteenth Annual Report of the Judicial Conference to the Governor of the State of New York and the Legislature 352 (Legislative Doc. No. 90, 1974).

[16] Although the Court is careful to leave the States free to develop alternative approaches, it nonetheless endorses the procedure described in text for adoptions of older children against the wishes of natural fathers who have established substantial relationships with the children. *Ante*, at 392–393, and 393 n. 13.

[17] To be effective, any such notice would probably have to name the mother and perhaps even identify her further, for example, by address. Moreover, the terms and placement of the notice in, for example, a newspaper, no matter how discreet and tastefully chosen, would inevitably be taken by the public as an announcement of illegitimate maternity. To avoid the embarrassment of such announcements, the mother might well

of the new relationship, and add to the expense and time required to conclude what is now usually a simple and certain process.[18] While it might not be irrational for a State to conclude that these costs should be incurred to protect the interest of natural fathers, it is nevertheless plain that those costs, which are largely the result of differences between the mother and the father, establish an imposing justification for *some* differential treatment of the two sexes in this type of situation.

With this much the Court does not disagree; it confines its holding to cases such as the one at hand involving the adoption of an *older* child against the wishes of a natural father who previously has participated in the rearing of the child and who admits paternity. *Ante*, at 392–393. The Court does conclude, however, that the gender basis for the classification drawn by § 111 (1)(c) makes differential treatment so suspect that the State has the burden of showing not only that the rule is generally justified but also that the justification holds equally true for *all* persons disadvantaged by the rule. In its view, since the justification is not as strong for some indeterminately small part of the disadvantaged class as it is for the class as a whole, see *ante*, at 393, the rule is invalid under the Equal Protection Clause insofar as it applies to that subclass. With this conclusion I disagree.

If we assume, as we surely must, that characteristics possessed by all members of one class and by no members of the other class justify some disparate treatment of mothers and fathers of children born out of wedlock, the mere fact that the statute draws a "gender-based distinction," see *ante*, at 389,

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be forced to identify the father (or potential fathers)—despite her desire to keep that fact a secret.

[18] In the opinion upon which it relied in dismissing the appeal in this case, the New York Court of Appeals concluded that the "trauma" that would be added to the adoption process by a paternal consent rule is "unpleasant to envision." *In re Malpica-Orsini*, 36 N. Y. 2d, at 574, 331 N. E. 2d, at 490. See n. 20, *infra*.

should not, in my opinion, give rise to any presumption that the impartiality principle embodied in the Equal Protection Clause has been violated.[19] Indeed, if we make the further undisputed assumption that the discrimination is justified in those cases in which the rule has its most frequent application—cases involving newborn infants and very young children in the custody of their natural mothers, see nn. 7 and 12, *supra*—we should presume that the law is entirely valid and require the challenger to demonstrate that its unjust applications are sufficiently numerous and serious to render it invalid.

In this case, appellant made no such showing; his demonstration of unfairness, assuming he has made one, extends only to himself and by implication to the unknown number of fathers just like him. Further, while appellant did nothing to inform the New York courts about the size of his subclass and the overall degree of its disadvantage under § 111 (1)(c), the New York Court of Appeals has previously concluded that the subclass is small and its disadvantage insignificant by comparison to the benefits of the rule as it now stands.[20]

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[19] *E. g., Califano* v. *Webster*, 430 U. S. 313; *Schlesinger* v. *Ballard*, 419 U. S. 498.

[20] "To require the consent of fathers of children born out of wedlock . . . or even some of them, would have the overall effect of denying homes to the homeless and of depriving innocent children of the other blessings of adoption. The cruel and undeserved out-of-wedlock stigma would continue its visitations. At the very least, the worthy process of adoption would be severely impeded.

"Great difficulty and expense would be encountered, in many instances, in locating the putative father to ascertain his willingness to consent. Frequently, he is unlocatable or even unknown. Paternity is denied more often than admitted. Some birth certificates set forth the names of the reputed fathers, others do not.

"Couples considering adoptions will be dissuaded out of fear of subsequent annoyance and entanglements. A 1961 study in Florida of 500 independent adoptions showed that 16% of the couples who had direct contact with the natural parents reported subsequent harassment, compared with only 2% of couples who had no contact (Isaac, Adopting a Child Today, pp 38, 116). The burden on charitable agencies will be

The mere fact that an otherwise valid general classification appears arbitrary in an isolated case is not a sufficient reason

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oppressive. In independent placements, the baby is usually placed in his adoptive home at four or five days of age, while the majority of agencies do not place children for several months after birth (p 88). Early private placements are made for a variety of reasons, such as a desire to decrease the trauma of separation and an attempt to conceal the out-of-wedlock birth. It is unlikely that the consent of the natural father could be obtained at such an early time after birth, and married couples, if well advised, would not accept a child, if the father's consent was a legal requisite and not then available. Institutions such as foundling homes which nurture the children for months could not afford to continue their maintenance, in itself not the most desirable, if fathers' consents are unobtainable and the wards therefore unplaceable. These philanthropic agencies would be reluctant to take infants for no one wants to bargain for trouble in an already tense situation. The drain on the public treasury would also be immeasurably greater in regard to infants placed in foster homes and institutions by public agencies.

"Some of the ugliest disclosures of our time involve black marketing of children for adoption. One need not be a clairvoyant to predict that the grant to unwed fathers of the right to veto adoptions will provide a very fertile field for extortion. The vast majority of instances where paternity has been established arise out of filiation proceedings, compulsory in nature, and persons experienced in the field indicate that these legal steps are instigated for the most part by public authorities, anxious to protect the public purse (see *Schaschlo v. Taishoff*, 2 N. Y. 2d 408, 411). While it may appear, at first blush, that a father might wish to free himself of the burden of support, there will be many who will interpret it as a chance for revenge or an opportunity to recoup their 'losses.'

"Marriages would be discouraged because of the reluctance of prospective husbands to involve themselves in a family situation where they might only be a foster parent and could not adopt the mother's offspring.

"We should be mindful of the jeopardy to which existing adoptions would be subjected and the resulting chaos by an unadulterated declaration of unconstitutionality. Even if there be a holding of nonretroactivity, the welfare of children, placed in homes months ago, or longer, and awaiting the institution or completion of legal proceedings, would be seriously affected. The attendant trauma is unpleasant to envision." *In re Malpica-Orsini, supra,* at 572–574, 331 N. E. 2d, at 488–490.

To the limited extent that the Court takes cognizance of these findings and conclusions, it does not dispute them. *Ante,* at 392, and 392–393,

for invalidating the entire rule.[21] Nor, indeed, is it a sufficient reason for concluding that the application of a valid rule in a hard case constitutes a violation of equal protection principles.[22] We cannot test the conformance of rules to the principle of equality simply by reference to exceptional cases.

Moreover, I am not at all sure that § 111 (1)(c) is arbitrary even if viewed solely in the light of the exceptional circumstances presently before the Court. This case involves a dispute between natural parents over which of the two may adopt the children. If both are given a veto, as the Court requires, neither may adopt and the children will remain illegitimate. If, instead of a gender-based distinction, the veto were given to the parent having custody of the child, the mother would prevail just as she did in the state court.[23]

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n. 13. Instead, the Court merely states that many of these findings do not reflect appellant's situation and "need not" reflect the situation of any natural father who is seeking to prevent the adoption of his older children. *Ante*, at 392.

Although I agree that the findings of the New York Court of Appeals are more likely to be true of the strong majority of adoptions that involve infants than they are in the present situation (a conclusion that should be sufficient to justify the classification drawn by § 111 (1)(c) in *all* situations), I am compelled to point out that the Court marshals not one bit of evidence to bolster its empirical judgment that most natural fathers facing the adoption of their older children will have appellant's relatively exemplary record with respect to admitting paternity and establishing a relationship with his children. In my mind, it is far more likely that what is true at infancy will be true thereafter—the mother will probably retain custody as well as the primary responsibility for the care and upbringing of the child.

[21] *Vance* v. *Bradley*, 440 U. S. 93, 108; *Califano* v. *Jobst*, 434 U. S. 47, 56–58; *Dandridge* v. *Williams*, 397 U. S. 471, 485.

[22] Even if the exclusive-consent requirement were limited to newborn infants, there would still be an occasional case in which the interests of the child would be better served by a responsible paternal veto than by an irresponsible maternal veto.

[23] In fact, although the Court understands it differently, the New York statute apparently *does* turn consent rights on custody. Thus, § 111 (1)(d) (McKinney 1977) gives consent rights to "any person . . . having

Whether or not it is wise to devise a special rule to protect the natural father who (a) has a substantial relationship with his child, and (b) wants to veto an adoption that a court has found to be in the best interests of the child, the record in this case does not demonstrate that the Equal Protection Clause requires such a rule.

I have no way of knowing how often disputes between natural parents over adoption of their children arise after the father "has established a substantial relationship with the child and [is willing to admit] his paternity," *ante,* at 393, but has previously been unwilling to take steps to legitimate his relationship. I am inclined to believe that such cases are relatively rare. But whether or not this assumption is valid, the far surer assumption is that in the more common adoption situations, the mother will be the more, and often the only, responsible parent, and that a paternal consent requirement will constitute a hindrance to the adoption process. Because this general rule is amply justified in its normal application, I would therefore require the party challenging its constitutionality to make some demonstration of unfairness in a significant number of situations before concluding that it violates

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lawful custody of the adoptive child." The New York courts have not had occasion to interpret this section in a situation in which a custodial father is seeking consent rights adverse to the wishes of the mother. Nonetheless, those courts have interpreted "legal custody" in a flexible and practical manner dependent on who actually is acting as the guardian of the child, *e. g., In re Erhardt,* 27 App. Div. 2d 836, 277 N. Y. S. 2d 734 (1967). Moreover, the Uniform Adoption Act, after which the New York statute appears to be patterned, has a similar section that its drafters intended to benefit "a father having custody of his illegitimate minor child." Uniform Adoption Act, § 5 (a)(3), Commissioners' Note, 9 U. L. A. 17 (1973). In this light, the allegedly improper impact of the gender-based classification in § 111 (1)(c) as challenged by appellant is even more attenuated than I have suggested because it only disqualifies those few natural fathers of older children who have established a substantial relationship with the child and have admitted paternity, but who nonetheless do not have custody of the children.

the Equal Protection Clause. That the Court has found a violation without requiring such a showing can only be attributed to its own "stereotyped reaction" to what is unquestionably, but in this case justifiably, a gender-based distinction.

II

Although the substantive due process issue is more troublesome,[24] I can briefly state the reason why I reject it.

I assume that, if and when one develops,[25] the relationship between a father and his natural child is entitled to protection against arbitrary state action as a matter of due process. See *Stanley* v. *Illinois*, 405 U. S. 645, 651.[26] Although the Court has not decided whether the Due Process Clause provides any greater substantive protection for this relationship than simply against official caprice,[27] it has indicated that an adoption decree that terminates the relationship is constitutionally justified by a finding that the father has abandoned or mistreated the child. See *id.*, at 652. In my view, such a decree may also be justified by a finding that the adoption will serve

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[24] Insofar as the New York statute allows natural fathers with actual custody of their illegitimate children to consent to the adoption of those children, see n. 23, *supra*, this issue is far less troublesome. Cf. *Stanley* v. *Illinois*, 405 U. S. 645.

[25] Cf. *Quilloin* v. *Walcott*, 434 U. S. 246. See also *Smith* v. *Organization of Foster Families*, 431 U. S., at 844.

[26] See also *id.*, at 842–847; *Armstrong* v. *Manzo*, 380 U. S. 545; *Meyer* v. *Nebraska*, 262 U. S. 390, 399–401.

[27] Although some Members of the Court have concluded that greater protection is due the "private realm of *family* life," *Prince* v. *Massachusetts*, 321 U. S. 158, 166 (emphasis added), *e. g.*, *Moore* v. *East Cleveland*, 431 U. S. 494 (plurality opinion), this appeal does not fall within that realm because whatever family life once surrounded appellant, his children, and appellee Maria Mohammed has long since dissolved through no fault of the State's. In fact, it is the State, rather than appellant, that may rely in this case on the importance of the family insofar as it is the State that is attempting to foster the establishment and privacy of new and legitimate adoptive families.

the best interests of the child, at least in a situation such as this in which the natural family unit has already been destroyed, the father has previously taken no steps to legitimate the child, and a further requirement such as a showing of unfitness would entirely deprive the child—and the State—of the benefits of adoption and legitimation.[28] As a matter of legislative policy, it can be argued that the latter reason standing alone is insufficient to sever the bonds that have developed between father and child. But that reason surely avoids the conclusion that the order is arbitrary, and is also sufficient to overcome any further protection of those bonds that may exist in the recesses of the Due Process Clause. Although the constitutional principle at least requires a legitimate and relevant reason and, in these circumstances, perhaps even a substantial reason, it does not require the reason to be one that a judge would accept if he were a legislator.

III

There is often the risk that the arguments one advances in dissent may give rise to a broader reading of the Court's opinion than is appropriate. That risk is especially grave when the Court is embarking on a new course that threatens to interfere with social arrangements that have come into use over long periods of time. Because I consider the course on which the Court is currently embarked to be potentially most serious, I shall explain why I regard its holding in this case as quite narrow.

The adoption decrees that have been entered without the consent of the natural father must number in the millions. An untold number of family and financial decisions have been made in reliance on the validity of those decrees. Because

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[28] See *Parham* v. *Hughes*, *ante*, at 353. Cf. *Quilloin* v. *Walcott*, *supra*, at 255, quoting *Smith* v. *Organization of Foster Families*, *supra*, at 862–863 (STEWART, J., concurring in judgment).

the Court has crossed a new constitutional frontier with today's decision, those reliance interests unquestionably foreclose retroactive application of this ruling. See *Chevron Oil Co.* v. *Huson*, 404 U. S. 97, 106–107. Families that include adopted children need have no concern about the probable impact of this case on their familial security.

Nor is there any reason why the decision should affect the processing of most future adoptions. The fact that an unusual application of a state statute has been held unconstitutional on equal protection grounds does not necessarily eliminate the entire statute as a basis for future legitimate state action. The procedure to be followed in cases involving infants who are in the custody of their mothers—whether solely or jointly with the father—or of agencies with authority to consent to adoption, is entirely unaffected by the Court's holding or by its reasoning. In fact, as I read the Court's opinion, the statutes now in effect may be enforced as usual unless "the adoption of an older child is sought," *ante*, at 392, and "the father has established a substantial relationship with the child and [is willing to admit] his paternity." *Ante*, at 393. State legislatures will no doubt promptly revise their adoption laws to comply with the rule of this case, but as long as state courts are prepared to construe their existing statutes to contain a requirement of paternal consent "in cases such as this," *ibid.*, I see no reason why they may not continue to enter valid adoption decrees in the countless routine cases that will arise before the statutes can be amended.[29]

In short, this is an exceptional case that should have no effect on the typical adoption proceeding. Indeed, I suspect

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[29] Cf. *Lucas* v. *Colorado General Assembly*, 377 U. S. 713, 739; *Roman* v. *Sincock*, 377 U. S. 695, 711–712; *WMCA, Inc.* v. *Lomenzo*, 377 U. S. 633, 655; *Reynolds* v. *Sims*, 377 U. S. 533, 585 (valid elections may go forward pursuant to statutes that have been held unconstitutional as violating the one-person, one-vote rule, when an impending election is imminent and the election machinery is already in progress).

that it will affect only a tiny fraction of the cases covered by the statutes that must now be rewritten. Accordingly, although my disagreement with the Court is as profound as that fraction is small, I am confident that the wisdom of judges will forestall any widespread harm.

I respectfully dissent.

ADDINGTON *v.* TEXAS

APPEAL FROM THE SUPREME COURT OF TEXAS

No. 77-5992. Argued November 28, 1978—Decided April 30, 1979

Appellant's mother filed a petition for his indefinite commitment to a state mental hospital in accordance with Texas law governing involuntary commitments. Appellant had a long history of confinements for mental and emotional disorders. The state trial court instructed the jury to determine whether, based on "clear, unequivocal and convincing evidence," appellant was mentally ill and required hospitalization for his own welfare and protection or the protection of others. Appellant contended that the trial court should have employed the "beyond a reasonable doubt" standard of proof. The jury found that appellant was mentally ill and that he required hospitalization, and the trial court ordered his commitment for an indefinite period. The Texas Court of Appeals reversed, agreeing with appellant on the standard-of-proof issue. The Texas Supreme Court reversed the Court of Appeals' decision and reinstated the trial court's judgment, concluding that a "preponderance of the evidence" standard of proof in a civil commitment proceeding satisfied due process and that since the trial court's improper instructions in the instant case had benefited appellant, the error was harmless.

Held: A "clear and convincing" standard of proof is required by the Fourteenth Amendment in a civil proceeding brought under state law to commit an individual involuntarily for an indefinite period to a state mental hospital. Pp. 425–433.

(a) The individual's liberty interest in the outcome of a civil commitment proceeding is of such weight and gravity, compared with the state's interests in providing care to its citizens who are unable, because of emotional disorders, to care for themselves and in protecting the community from the dangerous tendencies of some who are mentally ill, that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence. Pp. 425–427.

(b) Due process does not require states to use the "beyond a reasonable doubt" standard of proof applicable in criminal prosecutions and delinquency proceedings. *In re Winship*, 397 U. S. 358, distinguished. The reasonable-doubt standard is inappropriate in civil commitment proceedings because, given the uncertainties of psychiatric diagnosis, it may impose a burden the state cannot meet and thereby erect an unreasonable barrier to needed medical treatment. The state should

not be required to employ a standard of proof that may completely undercut its efforts to further the legitimate interests of both the state and the patient that are served by civil commitments. Pp. 427–431.

(c) To meet due process demands in commitment proceedings, the standard of proof has to inform the factfinder that the proof must be greater than the preponderance-of-the-evidence standard applicable to other categories of civil cases. However, use of the term "unequivocal" in conjunction with the terms "clear and convincing" in jury instructions (as included in the instructions given by the Texas state court in this case) is not constitutionally required, although states are free to use that standard. Pp. 431–433.

Appeal dismissed and certiorari granted; 557 S. W. 2d 511, vacated and remanded.

BURGER, C. J., delivered the opinion of the Court, in which all other Members joined, except POWELL, J., who took no part in the consideration or decision of the case.

Martha L. Boston, by appointment of the Court, 436 U. S. 916, argued the cause for appellant. With her on the brief were *Robert Plotkin* and *Paul R. Friedman.*

James F. Hury, Jr., argued the cause and filed a brief for appellee.

Joel I. Klein argued the cause and filed a brief for the American Psychiatric Assn. as *amicus curiae* urging affirmance.*

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question in this case is what standard of proof is required by the Fourteenth Amendment to the Constitution in a civil proceeding brought under state law to commit an

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**Ronald M. Soskin* filed a brief for the National Center for Law and the Handicapped as *amicus curiae* urging reversal.

Briefs of *amici curiae* were filed by *William J. Scott,* Attorney General, *Bernard Carey, Alan Grischke,* Special Assistant Attorney General, and *Henry A. Hauser* for the State of Illinois; and by *John Townsend Rich* for the National Assn. for Mental Health et al.

individual involuntarily for an indefinite period to a state mental hospital.

I

On seven occasions between 1969 and 1975, appellant was committed temporarily, Tex. Rev. Civ. Stat. Ann., Arts. 5547–31 to 5547–39 (Vernon 1958 and Supp. 1978–1979), to various Texas state mental hospitals and was committed for indefinite periods, Arts. 5547–40 to 5547–57, to Austin State Hospital on three different occasions. On December 18, 1975, when appellant was arrested on a misdemeanor charge of "assault by threat" against his mother, the county and state mental health authorities therefore were well aware of his history of mental and emotional difficulties.

Appellant's mother filed a petition for his indefinite commitment in accordance with Texas law. The county psychiatric examiner interviewed appellant while in custody and after the interview issued a Certificate of Medical Examination for Mental Illness. In the certificate, the examiner stated his opinion that appellant was "mentally ill and require[d] hospitalization in a mental hospital." Art. 5547–42 (Vernon 1958).

Appellant retained counsel and a trial was held before a jury to determine in accord with the statute:

> "(1) whether the proposed patient is mentally ill, and if so
>
> "(2) whether he requires hospitalization in a mental hospital for his own welfare and protection or the protection of others, and if so
>
> "(3) whether he is mentally incompetent." Art. 5547–51 (Vernon 1958).

The trial on these issues extended over six days.

The State offered evidence that appellant suffered from serious delusions, that he often had threatened to injure both of his parents and others, that he had been involved in several

assaultive episodes while hospitalized and that he had caused substantial property damage both at his own apartment and at his parents' home. From these undisputed facts, two psychiatrists, who qualified as experts, expressed opinions that appellant suffered from psychotic schizophrenia and that he had paranoid tendencies. They also expressed medical opinions that appellant was probably dangerous both to himself and to others. They explained that appellant required hospitalization in a closed area to treat his condition because in the past he had refused to attend outpatient treatment programs and had escaped several times from mental hospitals.

Appellant did not contest the factual assertions made by the State's witnesses; indeed, he conceded that he suffered from a mental illness. What appellant attempted to show was that there was no substantial basis for concluding that he was probably dangerous to himself or others.

The trial judge submitted the case to the jury with the instructions in the form of two questions:

> "1. Based on clear, unequivocal and convincing evidence, is Frank O'Neal Addington mentally ill?
>
> "2. Based on clear, unequivocal and convincing evidence, does Frank O'Neal Addington require hospitalization in a mental hospital for his own welfare and protection or the protection of others?"

Appellant objected to these instructions on several grounds, including the trial court's refusal to employ the "beyond a reasonable doubt" standard of proof.

The jury found that appellant was mentally ill and that he required hospitalization for his own or others' welfare. The trial court then entered an order committing appellant as a patient to Austin State Hospital for an indefinite period.

Appellant appealed that order to the Texas Court of Civil Appeals, arguing, among other things, that the standards for commitment violated his substantive due process rights and that any standard of proof for commitment less than that

required for criminal convictions, *i. e.*, beyond a reasonable doubt, violated his procedural due process rights. The Court of Civil Appeals agreed with appellant on the standard-of-proof issue and reversed the judgment of the trial court. Because of its treatment of the standard of proof, that court did not consider any of the other issues raised in the appeal.

On appeal, the Texas Supreme Court reversed the Court of Civil Appeals' decision. 557 S. W. 2d 511. In so holding the Supreme Court relied primarily upon its previous decision in *State* v. *Turner*, 556 S. W. 2d 563 (1977), cert. denied, 435 U. S. 929 (1978).

In *Turner*, the Texas Supreme Court held that a "preponderance of the evidence" standard of proof in a civil commitment proceeding satisfied due process. The court declined to adopt the criminal law standard of "beyond a reasonable doubt" primarily because it questioned whether the State could prove by that exacting standard that a particular person would or would not be dangerous in the future. It also distinguished a civil commitment from a criminal conviction by noting that under Texas law the mentally ill patient has the right to treatment, periodic review of his condition, and immediate release when no longer deemed to be a danger to himself or others. Finally, the *Turner* court rejected the "clear and convincing" evidence standard because under Texas rules of procedure juries could be instructed only under a beyond-a-reasonable-doubt or a preponderance standard of proof.

Reaffirming *Turner*, the Texas Supreme Court in this case concluded that the trial court's instruction to the jury, although not in conformity with the legal requirements, had benefited appellant, and hence the error was harmless. Accordingly, the court reinstated the judgment of the trial court.

We noted probable jurisdiction. 435 U. S. 967. After oral argument it became clear that no challenge to the constitutionality of any Texas statute was presented. Under 28 U. S. C. § 1257 (2) no appeal is authorized; accordingly, con-

struing the papers filed as a petition for a writ of certiorari, we now grant the petition.[1]

II

The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *In re Winship*, 397 U. S. 358, 370 (1970) (Harlan, J., concurring). The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.

Generally speaking, the evolution of this area of the law has produced across a continuum three standards or levels of proof for different types of cases. At one end of the spectrum is the typical civil case involving a monetary dispute between private parties. Since society has a minimal concern with the outcome of such private suits, plaintiff's burden of proof is a mere preponderance of the evidence. The litigants thus share the risk of error in roughly equal fashion.

In a criminal case, on the other hand, the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.[2] In the

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[1] See *Kulko* v. *California Superior Court*, 436 U. S. 84 (1978); *Hanson* v. *Denckla*, 357 U. S. 235 (1958); *May* v. *Anderson*, 345 U. S. 528 (1953). As in those cases, we continue to refer to the parties as appellant and appellee. See *Kulko* v. *California Superior Court*, *supra*, at 90 n. 4.

[2] Compare Morano, A Reexamination of the Development of the Reasonable Doubt Rule, 55 B. U. L. Rev. 507 (1975) (reasonable doubt represented a less strict standard than previous common-law rules), with May, Some Rules of Evidence, 10 Am. L. Rev. 642 (1875) (reasonable doubt constituted a stricter rule than previous ones). See generally Underwood, The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases, 86 Yale L. J. 1299 (1977).

administration of criminal justice, our society imposes almost the entire risk of error upon itself. This is accomplished by requiring under the Due Process Clause that the state prove the guilt of an accused beyond a reasonable doubt. *In re Winship, supra.*

The intermediate standard, which usually employs some combination of the words "clear," "cogent," "unequivocal" and "convincing," is less commonly used, but nonetheless "is no stranger to the civil law." *Woodby* v. *INS,* 385 U. S. 276, 285 (1966). See also C. McCormick, Evidence § 320 (1954); 9 J. Wigmore, Evidence § 2498 (3d ed. 1940). One typical use of the standard is in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant. The interests at stake in those cases are deemed to be more substantial than mere loss of money and some jurisdictions accordingly reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff's burden of proof. Similarly, this Court has used the "clear, unequivocal and convincing" standard of proof to protect particularly important individual interests in various civil cases. See, *e. g., Woodby* v. *INS, supra,* at 285 (deportation); *Chaunt* v. *United States,* 364 U. S. 350, 353 (1960) (denaturalization); *Schneiderman* v. *United States,* 320 U. S. 118, 125, 159 (1943) (denaturalization).

Candor suggests that, to a degree, efforts to analyze what lay jurors understand concerning the differences among these three tests or the nuances of a judge's instructions on the law may well be largely an academic exercise; there are no directly relevant empirical studies.[3] Indeed, the ultimate truth as to how the standards of proof affect decisionmaking may well be

[3] There have been some efforts to evaluate the effect of varying standards of proof on jury factfinding, see, *e. g.,* L. S. E. Jury Project, Juries and the Rules of Evidence, 1973 Crim. L. Rev. 208, but we have found no study comparing all three standards of proof to determine how juries, real or mock, apply them.

unknowable, given that factfinding is a process shared by countless thousands of individuals throughout the country. We probably can assume no more than that the difference between a preponderance of the evidence and proof beyond a reasonable doubt probably is better understood than either of them in relation to the intermediate standard of clear and convincing evidence. Nonetheless, even if the particular standard-of-proof catchwords do not always make a great difference in a particular case, adopting a "standard of proof is more than an empty semantic exercise." *Tippett* v. *Maryland*, 436 F. 2d 1153, 1166 (CA4 1971) (Sobeloff, J., concurring in part and dissenting in part), cert. dismissed *sub nom. Murel* v. *Baltimore City Criminal Court*, 407 U. S. 355 (1972). In cases involving individual rights, whether criminal or civil, "[t]he standard of proof [at a minimum] reflects the value society places on individual liberty." 436 F. 2d, at 1166.

III

In considering what standard should govern in a civil commitment proceeding, we must assess both the extent of the individual's interest in not being involuntarily confined indefinitely and the state's interest in committing the emotionally disturbed under a particular standard of proof. Moreover, we must be mindful that the function of legal process is to minimize the risk of erroneous decisions. See *Mathews* v. *Eldridge*, 424 U. S. 319, 335 (1976); *Speiser* v. *Randall*, 357 U. S. 513, 525–526 (1958).

A

This Court repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection. See, *e. g.*, *Jackson* v. *Indiana*, 406 U. S. 715 (1972); *Humphrey* v. *Cady*, 405 U. S. 504 (1972); *In re Gault*, 387 U. S. 1 (1967); *Specht* v. *Patterson*, 386 U. S. 605 (1967). Moreover, it is indisputable that involuntary commitment to a mental hospital after a finding

of probable dangerousness to self or others can engender adverse social consequences to the individual. Whether we label this phenomena "stigma" or choose to call it something else is less important than that we recognize that it can occur and that it can have a very significant impact on the individual.

The state has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable because of emotional disorders to care for themselves; the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill. Under the Texas Mental Health Code, however, the State has no interest in confining individuals involuntarily if they are not mentally ill or if they do not pose some danger to themselves or others. Since the preponderance standard creates the risk of increasing the number of individuals erroneously committed, it is at least unclear to what extent, if any, the state's interests are furthered by using a preponderance standard in such commitment proceedings.

The expanding concern of society with problems of mental disorders is reflected in the fact that in recent years many states have enacted statutes designed to protect the rights of the mentally ill. However, only one state by statute permits involuntary commitment by a mere preponderance of the evidence, Miss. Code Ann. § 41–21–75 (1978 Supp.), and Texas is the only state where a court has concluded that the preponderance-of-the-evidence standard satisfies due process. We attribute this not to any lack of concern in those states, but rather to a belief that the varying standards tend to produce comparable results. As we noted earlier, however, standards of proof are important for their symbolic meaning as well as for their practical effect.

At one time or another every person exhibits some abnormal behavior which might be perceived by some as symptomatic of a mental or emotional disorder, but which is in fact within

a range of conduct that is generally acceptable. Obviously, such behavior is no basis for compelled treatment and surely none for confinement. However, there is the possible risk that a factfinder might decide to commit an individual based solely on a few isolated instances of unusual conduct. Loss of liberty calls for a showing that the individual suffers from something more serious than is demonstrated by idiosyncratic behavior. Increasing the burden of proof is one way to impress the factfinder with the importance of the decision and thereby perhaps to reduce the chances that inappropriate commitments will be ordered.

The individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state. We conclude that the individual's interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence.

B

Appellant urges the Court to hold that due process requires use of the criminal law's standard of proof—"beyond a reasonable doubt." He argues that the rationale of the *Winship* holding that the criminal law standard of proof was required in a delinquency proceeding applies with equal force to a civil commitment proceeding.

In *Winship*, against the background of a gradual assimilation of juvenile proceedings into traditional criminal prosecutions, we declined to allow the state's "civil labels and good intentions" to "obviate the need for criminal due process safeguards in juvenile courts." 397 U. S., at 365–366. The Court saw no controlling difference in loss of liberty and stigma between a conviction for an adult and a delinquency adjudication for a juvenile. *Winship* recognized that the basic issue—whether the individual in fact committed a criminal act—was

the same in both proceedings. There being no meaningful distinctions between the two proceedings, we required the state to prove the juvenile's act and intent beyond a reasonable doubt.

There are significant reasons why different standards of proof are called for in civil commitment proceedings as opposed to criminal prosecutions. In a civil commitment state power is not exercised in a punitive sense.[4] Unlike the delinquency proceeding in *Winship*, a civil commitment proceeding can in no sense be equated to a criminal prosecution. Cf. *Woodby* v. *INS*, 385 U. S., at 284–285.

In addition, the "beyond a reasonable doubt" standard historically has been reserved for criminal cases. This unique standard of proof, not prescribed or defined in the Constitution, is regarded as a critical part of the "moral force of the criminal law," *In re Winship*, 397 U. S., at 364, and we should hesitate to apply it too broadly or casually in noncriminal cases. Cf. *ibid.*

The heavy standard applied in criminal cases manifests our concern that the risk of error to the individual must be minimized even at the risk that some who are guilty might go free. *Patterson* v. *New York*, 432 U. S. 197, 208 (1977). The full force of that idea does not apply to a civil commitment. It may be true that an erroneous commitment is sometimes as undesirable as an erroneous conviction, 5 J. Wigmore, Evidence § 1400 (Chadbourn rev. 1974). However, even though an erroneous confinement should be avoided in the first instance, the layers of professional review and observation of the patient's condition, and the concern of family and

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[4] The State of Texas confines only for the purpose of providing care designed to treat the individual. As the Texas Supreme Court said in *State* v. *Turner*, 556 S. W. 2d 563, 566 (1977):

"The involuntary mental patient is entitled to treatment, to periodic and recurrent review of his mental condition, and to release at such time as he no longer presents a danger to himself or others."

friends generally will provide continuous opportunities for an erroneous commitment to be corrected. Moreover, it is not true that the release of a genuinely mentally ill person is no worse for the individual than the failure to convict the guilty. One who is suffering from a debilitating mental illness and in need of treatment is neither wholly at liberty nor free of stigma. See Chodoff, The Case for Involuntary Hospitalization of the Mentally Ill, 133 Am. J. Psychiatry 496, 498 (1976); Schwartz, Myers, & Astrachan, Psychiatric Labeling and the Rehabilitation of the Mental Patient, 31 Arch. Gen. Psychiatry 329, 334 (1974). It cannot be said, therefore, that it is much better for a mentally ill person to "go free" than for a mentally normal person to be committed.

Finally, the initial inquiry in a civil commitment proceeding is very different from the central issue in either a delinquency proceeding or a criminal prosecution. In the latter cases the basic issue is a straightforward factual question—did the accused commit the act alleged? There may be factual issues to resolve in a commitment proceeding, but the factual aspects represent only the beginning of the inquiry. Whether the individual is mentally ill and dangerous to either himself or others and is in need of confined therapy turns on the *meaning* of the facts which must be interpreted by expert psychiatrists and psychologists. Given the lack of certainty and the fallibility of psychiatric diagnosis, there is a serious question as to whether a state could ever prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous. See *O'Connor* v. *Donaldson*, 422 U. S. 563, 584 (1975) (concurring opinion); *Blocker* v. *United States*, 110 U. S. App. D. C. 41, 48–49, 288 F. 2d 853, 860–861 (1961) (opinion concurring in result). See also *Tippett* v. *Maryland*, 436 F. 2d, at 1165 (Sobeloff, J., concurring in part and dissenting in part); Note, Civil Commitment of the Mentally Ill: Theories and Procedures, 79 Harv. L. Rev. 1288, 1291 (1966); Note, Due Process and the Development of "Criminal" Safeguards

in Civil Commitment Adjudications, 42 Ford. L. Rev. 611, 624 (1974).

The subtleties and nuances of psychiatric diagnosis render certainties virtually beyond reach in most situations. The reasonable-doubt standard of criminal law functions in its realm because there the standard is addressed to specific, knowable facts. Psychiatric diagnosis, in contrast, is to a large extent based on medical "impressions" drawn from subjective analysis and filtered through the experience of the diagnostician. This process often makes it very difficult for the expert physician to offer definite conclusions about any particular patient. Within the medical discipline, the traditional standard for "factfinding" is a "reasonable medical certainty." If a trained psychiatrist has difficulty with the categorical "beyond a reasonable doubt" standard, the untrained lay juror—or indeed even a trained judge—who is required to rely upon expert opinion could be forced by the criminal law standard of proof to reject commitment for many patients desperately in need of institutionalized psychiatric care. See *ibid.* Such "freedom" for a mentally ill person would be purchased at a high price.

That practical considerations may limit a constitutionally based burden of proof is demonstrated by the reasonable-doubt standard, which is a compromise between what is possible to prove and what protects the rights of the individual. If the state was required to guarantee error-free convictions, it would be required to prove guilt beyond all doubt. However, "[d]ue process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person." *Patterson* v. *New York, supra,* at 208. Nor should the state be required to employ a standard of proof that may completely undercut its efforts to further the legitimate interests of both the state and the patient that are served by civil commitments.

That some states have chosen—either legislatively or judi-

cially—to adopt the criminal law standard [5] gives no assurance that the more stringent standard of proof is needed or is even adaptable to the needs of all states. The essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold. As the substantive standards for civil commitment may vary from state to state, procedures must be allowed to vary so long as they meet the constitutional minimum. See Monahan & Wexler, A Definite Maybe: Proof and Probability in Civil Commitment, 2 Law & Human Behavior 37, 41–42 (1978); Share, The Standard of Proof in Involuntary Civil Commitment Proceedings, 1977 Detroit College L. Rev. 209, 210. We conclude that it is unnecessary to require states to apply the strict, criminal standard.

C

Having concluded that the preponderance standard falls short of meeting the demands of due process and that the reasonable-doubt standard is not required, we turn to a middle level of burden of proof that strikes a fair balance between the rights of the individual and the legitimate concerns of the state. We note that 20 states, most by statute, employ the standard of "clear and convincing" evidence; [6] 3 states use

[5] Haw. Rev. Stat. § 334–60 (b)(4)(I) (Supp. 1978); Idaho Code § 66–329 (i) (Supp. 1978); Kan. Stat. Ann. § 59–2917 (1976); Mont. Rev. Codes Ann. § 38–1305 (7) (Supp. 1977); Okla. Stat., Tit. 43A, § 54.1 (C) (Supp. 1978); Ore. Rev. Stat. § 426.130 (1977); Utah Code Ann. § 64–7–36 (6) (1953); Wis. Stat. § 51.20 (14)(e) (Supp. 1978–1979); *Superintendent of Worcester State Hospital* v. *Hagberg*, 374 Mass. 271, 372 N. E. 2d 242 (1978); *Proctor* v. *Butler*, 117 N. H. 927, 380 A. 2d 673 (1977); *In re Hodges*, 325 A. 2d 605 (D. C. 1974); *Lausche* v. *Commissioner of Public Welfare*, 302 Minn. 65, 225 N. W. 2d 366 (1974), cert. denied, 420 U. S. 993 (1975). See also *In re J. W.*, 44 N. J. Super. 216, 130 A. 2d 64 (App. Div.), cert. denied, 24 N. J. 465, 132 A. 2d 558 (1957); *Denton* v. *Commonwealth*, 383 S. W. 2d 681 (Ky. App. 1964) (dicta).

[6] Ariz. Rev. Stat. Ann. § 36–540 (1974); Colo. Rev. Stat. § 27–10–111 (1) (Supp. 1976); Conn. Gen. Stat. § 17–178 (e) (1979); Del. Code Ann., Tit. 16, § 5010 (2) (Supp. 1978); Ga. Code § 88–501 (u) (1978); Ill. Rev.

"clear, *cogent,* and convincing" evidence;[7] and 2 states require "clear, *unequivocal* and convincing" evidence.[8]

In *Woodby* v. *INS,* 385 U. S. 276 (1966), dealing with deportation, and *Schneiderman* v. *United States,* 320 U. S., at 125, 159, dealing with denaturalization, the Court held that "clear, unequivocal, and convincing" evidence was the appropriate standard of proof. The term "unequivocal," taken by itself, means proof that admits of no doubt,[9] a burden approximating, if not exceeding, that used in criminal cases. The issues in *Schneiderman* and *Woodby* were basically factual and therefore susceptible of objective proof and the consequences to the individual were unusually drastic—loss of citizenship and expulsion from the United States.

We have concluded that the reasonable-doubt standard is inappropriate in civil commitment proceedings because, given the uncertainties of psychiatric diagnosis, it may impose a burden the state cannot meet and thereby erect an unreasonable barrier to needed medical treatment. Similarly, we conclude that use of the term "unequivocal" is not constitutionally required, although the states are free to use that standard. To meet due process demands, the standard has to

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Stat., ch. 91½, § 3–808 (Supp. 1977); Iowa Code § 229.12 (1979); La. Rev. Stat. Ann. § 28:55E (West Supp. 1979); Me. Rev. Stat. Ann., Tit. 34, § 2334 (5)(A)(1) (1978); Mich. Stat. Ann. § 14.800 (465) (1976); Neb. Rev. Stat. § 83–1035 (1976); N. M. Stat. Ann. § 43–1–11C (1978); N. D. Cent. Code § 25–03.1–19 (1978); Ohio Rev. Code Ann. § 5122.15 (B) (Supp. 1978); Pa. Stat. Ann., Tit. 50, § 7304 (f) (Purdon Supp. 1978–1979); S. C. Code § 44–17–580 (Supp. 1978); S. D. Comp. Laws Ann. § 27A–9–18 (1977); Vt. Stat. Ann., Tit. 18, § 7616 (b) (Supp. 1978); Md. Dept. of Health & Mental Hygiene Reg. 10.21.03G (1973); *In re Beverly,* 342 So. 2d 481 (Fla. 1977).

[7] N. C. Gen. Stat. § 122–58.7 (i) (Supp. 1977); Wash. Rev. Code § 71.05.310 (1976); *State ex rel. Hawks* v. *Lazaro,* 157 W. Va. 417, 202 S. E. 2d 109 (1974).

[8] Ala. Code § 22–52–10 (a) (Supp. 1978); Tenn. Code Ann. § 33–604 (d) (Supp. 1978).

[9] See Webster's Third New International Dictionary 2494 (1961).

inform the factfinder that the proof must be greater than the preponderance-of-the-evidence standard applicable to other categories of civil cases.

We noted earlier that the trial court employed the standard of "clear, unequivocal and convincing" evidence in appellant's commitment hearing before a jury. That instruction was constitutionally adequate. However, determination of the precise burden equal to or greater than the "clear and convincing" standard which we hold is required to meet due process guarantees is a matter of state law which we leave to the Texas Supreme Court.[10] Accordingly, we remand the case for further proceedings not inconsistent with this opinion.

Vacated and remanded.

MR. JUSTICE POWELL took no part in the consideration or decision of this case.

[10] We noted earlier the court's holding on harmless error. See *supra*, at 422.

JAPAN LINE, LTD., ET AL. *v.* COUNTY OF LOS ANGELES ET AL.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA

No. 77–1378. Argued January 8, 1979—Decided April 30, 1979

Appellant Japanese shipping companies' vessels carry cargo containers which, like the ships, are owned by appellants, are based, registered, and subjected to property tax in Japan, and are used exclusively in foreign commerce. A number of appellants' containers were temporarily present in appellee county and cities in California, and appellees levied property taxes on the containers. The California Supreme Court upheld the tax as applied.

Held:

1. This Court has appellate jurisdiction under 28 U. S. C. § 1257 (2), since the California Supreme Court sustained the tax, as applied, as against the contention that such application would violate the Commerce Clause and various treaties. Pp. 440–441.

2. It is unnecessary to decide the broad proposition whether mere use of international routes is enough, under the "home port doctrine," to render an instrumentality immune from tax in a nondomiciliary State. The question here is a more narrow one, namely, whether instrumentalities of commerce that are owned, based, and registered abroad, and that are used exclusively in international commerce, may be subjected to apportioned ad valorem property taxation by a State. Pp. 441–444.

3. While under *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274, no impermissible burden on interstate commerce will be found if a state tax "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State," *id.*, at 279, a more elaborate inquiry is necessary when a State seeks to tax the instrumentalities of foreign, rather than of interstate, commerce. In addition to answering the nexus, apportionment, and nondiscrimination questions posed in *Complete Auto*, a court must also inquire, first, whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation, and, second, whether the tax prevents the Federal Government from "speak[ing] with one voice when regulating commercial relations with foreign governments." *Michelin Tire Corp.* v. *Wages*, 423 U. S. 276, 285. If a state tax contravenes either of these precepts, it is unconstitutional under the Commerce Clause. Pp. 444–451.

4. The California ad valorem property tax, as applied to appellants' shipping containers, is unconstitutional under the Commerce Clause, since it results in multiple taxation of the instrumentalities of foreign commerce, *Moorman Mfg. Co.* v. *Bair*, 437 U. S. 267, distinguished, and prevents this Nation from "speaking with one voice" in regulating foreign trade and thus is inconsistent with Congress' power to "regulate Commerce with foreign Nations." Pp. 451–457.

20 Cal. 3d 180, 571 P. 2d 254, reversed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, MARSHALL, POWELL, and STEVENS, JJ., joined. REHNQUIST, J., filed a dissenting statement, *post*, p. 457.

Peter L. Briger argued the cause for appellants. With him on the briefs were *Sheldon S. Cohen* and *Reed M. Williams*.

James Dexter Clark argued the cause for appellees. With him on the briefs was *John H. Larson*.

Kent L. Jones argued the cause *pro hac vice* for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General McCree, Assistant Attorneys General Babcock* and *Ferguson, Leonard Schaitman*, and *Ernest J. Brown*.*

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents the question whether a State, consistently with the Commerce Clause of the Constitution, may

*Briefs of *amici curiae* urging reversal were filed by *Gary J. Torre* and *Arthur K. Mason* for Aer Lingus et al.; by *Edward A. McDermott* and *Allen R. Snyder* for the Council of European and Japanese National Shipowners' Assns.; and by *James W. McGrath* for Sea Land Service, Inc.

Briefs of *amici curiae* urging affirmance were filed by *Evelle J. Younger*, Attorney General, *Ernest P. Goodman*, Assistant Attorney General, and *Philip C. Griffin* and *Patti S. Kitching*, Deputy Attorneys General, for the State of California; and by *William D. Dexter* for the Multistate Tax Commission.

Briefs of *amici curiae* were filed by *George S. Lapham, Jr.*, and *Kathleen O. Argiropoulos* for Air New England, Inc., et al.; by *Jay D. Howell, Jr.*, for the city of Houston; and by *Dennis J. Kenny* for the Institute of International Container Lessors, Ltd.

impose a nondiscriminatory ad valorem property tax on foreign-owned instrumentalities (cargo containers) of international commerce.

I

The facts were "stipulated on appeal," App. 29, and were found by the trial court, *id.*, at 33–36, as follows:

Appellants are six Japanese shipping companies; they are incorporated under the laws of Japan, and they have their principal places of business and commercial domiciles in that country. *Id.*, at 34. Appellants operate vessels used exclusively in foreign commerce; these vessels are registered in Japan and have their home ports there. *Ibid.* The vessels are specifically designed and constructed to accommodate large cargo shipping containers.[1] The containers, like the ships, are owned by appellants, have their home ports in Japan, and are used exclusively for hire in the transportation of cargo in foreign commerce. *Id.*, at 35. Each container is in constant transit save for time spent undergoing repair or awaiting loading and unloading of cargo. All appellants' containers are subject to property tax in Japan and, in fact, are taxed there.

Appellees are political subdivisions of the State of California. Appellants' containers, in the course of their inter-

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[1] "A container is a permanent reusable article of transport equipment . . . durably made of metal, and equipped with doors for easy access to the goods and for repeated use. It is designed to facilitate the handling, loading, stowage aboard ship, carriage, discharge from ship, movement, and transfer of large numbers of packages simultaneously by mechanical means to minimize the cost and risks of manually processing each package." Simon, The Law of Shipping Containers, 5 J. Mar. L. & Com. 507, 513 (1974).

See Customs Convention on Containers, Art. I (*b*), May 18, 1956, [1969] 20 U. S. T. 301, 304, T. I. A. S. No. 6634. Although containers may be as small as 1 cubic meter (35.3 cubic feet), 49 CFR § 420.3 (c)(5) (1977), they are typically 8 feet high, 8 feet wide, and between 8 and 40 feet long. Simon, 5 J. Mar. L. & Com., at 510.

national journeys, pass through appellees' jurisdictions intermittently. Although none of appellants' containers stays permanently in California, some are there at any given time; a container's average stay in the State is less than three weeks. *Ibid.* The containers engage in no intrastate or interstate transportation of cargo except as continuations of international voyages. *Id.*, at 30. Any movements or periods of nonmovement of containers in appellees' jurisdictions are essential to, and inseparable from, the containers' efficient use as instrumentalities of foreign commerce. *Id.*, at 35–36.

Property present in California on March 1 (the "lien date" under California law) of any year is subject to ad valorem property tax. Cal. Rev. & Tax. Code Ann. §§ 117, 405, 2192 (West 1970 and Supp. 1979). A number of appellants' containers were physically present in appellees' jurisdictions on the lien dates in 1970, 1971, and 1972; this number was fairly representative of the containers' "average presence" during each year. App. 35. Appellees levied property taxes in excess of $550,000 on the assessed value of the containers present on March 1 of the three years in question. *Id.*, at 36. During the same period, similar containers owned or controlled by steamship companies domiciled in the United States, that appeared from time to time in Japan during the course of international commerce, were not subject to property taxation in Japan, and therefore were not, in fact, taxed in that country. *Id.*, at 35.

Appellants paid the taxes, so levied, under protest and sued for their refund in the Superior Court for the County of Los Angeles. That court awarded judgment in appellants' favor.[2] *Id.*, at 39–40. The court found that appellants' containers were instrumentalities of foreign commerce that had their home ports in Japan where they were taxed. The federal courts, however, in the trial court's view, had "consistently held that vessels which are instrumentalities of foreign com-

[2] The opinion of the Superior Court is not officially reported.

merce and engaged in foreign commerce can be taxed in their home port only." *Id.*, at 24. This rule, said the court, was necessary to avoid multiple taxation, *id.*, at 23; whereas apportionment of taxes can be used to prevent duplicative taxation in interstate commerce, apportionment is "not practical" when one of the taxing entities is a foreign sovereign. In such cases, "[t]here is no tribunal that can adjudicate [competing] rights unless it be the International Court and to invoke its services jurisdiction must be consented to by all parties." *Id.*, at 24. The application of appellees' taxes in derogation of the "home port doctrine," the court concluded, subjected international commerce to multiple taxation and thus was unconstitutional under the Commerce Clause. In so holding, the court followed *Scandinavian Airlines System, Inc.* v. *County of Los Angeles*, 56 Cal. 2d 11, 363 P. 2d 25, cert. denied, 368 U. S. 899 (1961) (hereinafter *SAS*) (ruling that ad valorem property tax levied by California upon aircraft owned, based, and registered abroad and used exclusively in international commerce, was unconstitutional under the Commerce Clause).

The Court of Appeal reversed. 132 Cal. Rptr. 531 (1976). The court appeared to conclude that *SAS* had been effectively overruled by *Sea-Land Service, Inc.* v. *County of Alameda*, 12 Cal. 3d 772, 528 P. 2d 56 (1974). In *Sea-Land*, the Supreme Court of California had criticized the home port doctrine and labeled it "anachronistic," and had upheld apportioned property taxation of containers owned by a domestic corporation and used in both intercoastal and foreign commerce. *Id.*, at 787, 528 P. 2d, at 66. The Court of Appeal rejected appellants' arguments that a different result was required here in view of their containers' foreign ownership and exclusively international use. The court likewise dismissed any argument as to multiple taxation. "[T]he possibility of international double taxation of instrumentalities of foreign commerce," it concluded, is "no reason to limit the local power to

tax them upon a nondiscriminatory apportioned basis." 132 Cal. Rptr., at 533.[3]

The California Supreme Court granted a hearing of the case and it, too, reversed the judgment of the Superior Court, essentially adopting the opinion of the Court of Appeal. 20 Cal. 3d 180, 571 P. 2d 254 (1977). It concluded that "the threat of double taxation from foreign taxing authorities has no role in commerce clause considerations of multiple burdens, since burdens in international commerce are not attributable to discrimination by the taxing state and are matters for international agreement." *Id.*, at 185, 571 P. 2d, at 257. Deeming the containers' foreign ownership and use irrelevant for purposes of constitutional analysis, *id.*, at 186, 571 P. 2d, at 257–258, the court rejected appellants' Commerce Clause challenge and sustained the validity of the tax as applied.[4]

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[3] The Court of Appeal also rejected, 132 Cal. Rptr., at 534, appellants' argument that California's tax was prohibited by Art. XI, §§ 1 and 4, and by Art. XXII, § 2, of the Treaty of Friendship, Commerce and Navigation Between the United States of America and Japan, Apr. 2, 1953, [1953] 4 U. S. T. 2063, T. I. A. S. No. 2863 (providing that Japanese nationals residing in the United States may not be subjected to payment of taxes "more burdensome than those borne by" United States nationals, and according Japan "most favored nation" status). Appellants repeat this argument here, and we reject it. The provisions appellants cite interdict *discrimination* against Japanese nationals; there is no evidence that California has treated Japanese containers differently from domestic containers for purposes of applying its property tax.

The Court of Appeal likewise rejected, 132 Cal. Rptr., at 533, appellants' argument that California's tax constituted an indirect "Duty of Tonnage" proscribed by U. S. Const., Art. I, § 10, cl. 3. Appellants repeat this argument here; in view of our disposition, we do not reach it. The Court of Appeal noted that appellants did not challenge California's tax on due process grounds. See 132 Cal. Rptr., at 532 n. 2. Although appellants proffer a due process challenge here, we need not reach it either.

[4] The California Supreme Court also rejected appellants' argument that California's tax constituted "Imposts or Duties" proscribed by U. S. Const., Art. I, § 10, cl. 2. 20 Cal. 3d, at 186–188, 571 P. 2d, at 258–259. Appellants reiterate this argument here; in view of our disposition, we do

Appellants appealed. We postponed consideration of our jurisdiction to the hearing on the merits. 436 U. S. 955 (1978).

II

This Court has appellate jurisdiction to review a final judgment rendered by the highest court of a State in which a decision could be had "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity." 28 U. S. C. § 1257 (2). In this case, appellants drew in question the validity of California's ad valorem property tax, contending that the tax, as applied to their containers, was repugnant to the Commerce Clause and various treaties, and the California Supreme Court sustained the validity of the tax. Under these circumstances, this Court's appellate jurisdiction would seem manifest.

Appellees suggest that the California courts did not in reality uphold the tax statute against constitutional attack, but simply refused to extend to appellants a constitutional immunity from taxation. Motion to Dismiss or Affirm 2. Appellees' suggested recharacterization is unpersuasive. Appellants squarely challenged the constitutionality of the tax

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not consider it. In their petition for rehearing, appellants argued that the tax contravened Art. III, §§ 1 and 2 of the General Agreement on Tariffs and Trade (GATT), 61 Stat. A18 (providing that "imported products" may not be subjected to heavier taxes, or to less favorable treatment, than like products of domestic origin). Pet. for Rehearing 35–40. The court rejected this latter argument *sub silentio*. 20 Cal. 3d, at 190. Appellants repeat this argument here, and we deem it frivolous. Assuming, *arguendo*, that appellants' containers, as instrumentalities of commerce entering this country subject to re-exportation, could be labeled "imported products" within the meaning of GATT, the provisions on which appellants rely prohibit only *discriminatory* treatment. As noted in n. 3, *supra*, there is no evidence that California has treated Japanese containers differently from domestic containers for purposes of applying its property tax.

statute, as applied, and the California Supreme Court just as squarely sustained its validity, as applied. We have held consistently that a state statute is sustained within the meaning of § 1257 (2) when a state court holds it applicable to a particular set of facts as against the contention that such application is invalid on federal grounds. *E. g., Cohen* v. *California,* 403 U. S. 15, 17–18 (1971); *Warren Trading Post* v. *Arizona Tax Comm'n,* 380 U. S. 685, 686, and n. 1 (1965); *Bantam Books, Inc.* v. *Sullivan,* 372 U. S. 58, 61 n. 3 (1963); *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282, 288–290 (1921). We conclude that we have appellate jurisdiction of this case.

III

A

The "home port doctrine" was first alluded to in *Hays* v. *Pacific Mail S. S. Co.,* 17 How. 596 (1855). In *Hays,* California sought to impose property taxes on oceangoing vessels intermittently touching its ports. The vessels' home port was New York City, where they were owned, registered, and based; they engaged in intercoastal commerce by way of the Isthmus of Panama, and remained in California briefly to unload cargo and undergo repairs. This Court held that the ships had established no tax situs in California:

> "We are satisfied that the State of California had no jurisdiction over these vessels for the purpose of taxation; they were not, properly, abiding within its limits, so as to become incorporated with the other personal property of the State; they were there but temporarily, engaged in lawful trade and commerce, with their *situs* at the home port, where the vessels belonged, and where the owners were liable to be taxed for the capital invested, and where the taxes had been paid." *Id.,* at 599–600.

Because the vessels were properly taxable in their home port,

this Court concluded, they could not be taxed in California at all.[5]

The "home port doctrine" enunciated in *Hays* was a corollary of the medieval maxim *mobilia sequuntur personam* ("movables follow the person," see Black's Law Dictionary 1154 (rev. 4th ed. 1968)) and resulted in personal property being taxable in full at the domicile of the owner. This theory of taxation, of course, has fallen into desuetude, and the "home port doctrine," as a rule for taxation of moving equipment, has yielded to a rule of fair apportionment among the States. This Court, accordingly, has held that various instrumentalities of commerce may be taxed, on a properly apportioned basis, by the nondomiciliary States through which they travel. *E. g., Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18 (1891); *Ott* v. *Mississippi Valley Barge Line Co.*, 336 U. S. 169 (1949); *Braniff Airways, Inc.* v. *Nebraska State Bd. of Equalization*, 347 U. S. 590 (1954). In discarding the "home port" theory for the theory of apportionment, however, the Court consistently has distinguished the case of oceangoing vessels. *E. g., Pullman's Palace*, 141 U. S., at 23–24 (approving apportioned tax on railroad rolling stock, but distinguishing vessels "engaged in interstate or foreign commerce upon the high seas"); *Ott*, 336 U. S., at 173–174 (approving apportioned tax on barges navigating inland waterways, but "not reach[ing] the question of taxability of ocean carriage"); *Braniff*, 347 U. S., at 600 (approving apportioned tax on domestic aircraft, but distinguishing vessels "used to plow the open seas"). Relying on these cases, appellants argue that the "home port doctrine," yet vital, continues to prescribe the proper rule for state taxation of oceangoing ships. Since

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[5] The "home port doctrine" was reaffirmed, as to oceangoing vessels, in *Morgan* v. *Parham*, 16 Wall. 471, 476–477 (1873), and in *Southern Pacific Co.* v. *Kentucky*, 222 U. S. 63, 69 (1911). It was applied to vessels moving in inland waters in *St. Louis* v. *Ferry Co.*, 11 Wall. 423 (1871), and in *Ayer & Lord Tie Co.* v. *Kentucky*, 202 U. S. 409, 421–423 (1906).

containers are "functionally a part of the ship," *Leather's Best, Inc.* v. *S. S. Mormaclynx*, 451 F. 2d 800, 815 (CA2 1971), appellants conclude, the containers, like the ships, may be taxed only at their home ports in Japan, and thus are immune from tax in California.

Although appellants' argument, as will be seen below, has an inner logic, we decline to cast our analysis of the present case in this mold. The "home port doctrine" can claim no unequivocal constitutional source; in assessing the legitimacy of California's tax, the *Hays* Court did not rely on the Commerce Clause, nor could it, in 1854, have relied on the Due Process Clause of the Fourteenth Amendment. The basis of the "home port doctrine," rather, was common-law jurisdiction to tax.[6] Given its origins, the doctrine could be said to be "anachronistic"; given its underpinnings, it may indeed be said to have been "abandoned." *Northwest Airlines, Inc.* v. *Minnesota*, 322 U. S. 292, 320 (1944) (Stone, C. J., dissenting). As a theoretical matter, then, to rehabilitate the "home port doctrine" as a tool of Commerce Clause analysis would be somewhat odd. More importantly, to hold in this case that the "home port doctrine" survives would be to prove too much. If an oceangoing vessel could indeed be taxed only at its home port, taxation by a nondomiciliary State logically would be barred, regardless of whether the vessel were domestically or foreign owned, and regardless of whether it were engaged in domestic or foreign commerce. In *Hays* itself, the vessel was owned in New York and was engaged in interstate commerce through international waters. There is no need in this case to decide currently the broad proposition whether mere use of international routes is enough, under the "home port doctrine," to render an instrumentality im-

[6] See, *e. g.*, Note, 49 Calif. L. Rev. 968, 970–971 (1961); Note, State Taxation of International Air Transportation, 11 Stan. L. Rev. 518, 522, and n. 19 (1959); Page, Jurisdiction to Tax Tangible Movables, 1945 Wis. L. Rev. 125, 143–144.

mune from tax in a nondomiciliary State. The question here is a much more narrow one, that is, whether instrumentalities of commerce that are owned, based, and registered abroad and that are used exclusively in international commerce, may be subjected to apportioned ad valorem property taxation by a State.[7]

B

The Constitution provides that "Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art. I, § 8, cl. 3. In construing Congress' power to "regulate Commerce . . . among the several States," the Court recently has affirmed that the Constitution confers no immunity from state taxation, and that "interstate commerce must bear its fair share of the state tax burden." *Washington Revenue Dept.* v. *Association of Wash. Stevedoring Cos.*, 435 U. S. 734, 750 (1978). Instrumentalities of interstate commerce are no exception to this rule, and the Court regularly has sustained property taxes as applied to various forms of transportation equipment. See *Pullman's Palace*, *supra* (railroad rolling stock); *Ott*, *supra* (barges on inland waterways); *Braniff*, *supra* (domestic aircraft). Cf. *Central Greyhound Lines* v. *Mealey*, 334 U. S. 653, 663 (1948) (motor vehicles). If the state tax "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the

[7] Accordingly, we do not reach questions as to the taxability of foreign-owned instrumentalities engaged in interstate commerce, or of domestically owned instrumentalities engaged in foreign commerce. Cf. *Sea-Land Service, Inc.* v. *County of Alameda*, 12 Cal. 3d 772, 528 P. 2d 56 (1974) (domestically owned containers used in intercoastal and foreign commerce held subject to apportioned property tax); *Flying Tiger Line, Inc.* v. *County of Los Angeles*, 51 Cal. 2d 314, 333 P. 2d 323 (1958) (domestically owned aircraft used in foreign commerce held subject to apportioned property tax).

services provided by the State," no impermissible burden on interstate commerce will be found. *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274, 279 (1977); *Washington Revenue Dept.*, 435 U. S., at 750.

Appellees contend that cargo shipping containers, like other vehicles of commercial transport, are subject to property taxation, and that the taxes imposed here meet *Complete Auto*'s fourfold requirements. The containers, they argue, have a "substantial nexus" with California because some of them are present in that State at all times; jurisdiction to tax is based on "the habitual employment of the property within the State," *Braniff*, 347 U. S., at 601, and appellants' containers habitually are so employed. The tax, moreover, is "fairly apportioned," since it is levied only on the containers' "average presence" in California.[8] The tax "does not discriminate," thirdly, since it falls evenhandedly on all personal property in the State; indeed, as an ad valorem tax of general application, it is of necessity nondiscriminatory. The tax, finally, is "fairly related to the services provided by" California, services that include not only police and fire protection, but also the benefits of a trained work force and the advantages of a civilized society.

These observations are not without force. We may assume that, if the containers at issue here were instrumentalities of purely interstate commerce, *Complete Auto* would apply and be satisfied, and our Commerce Clause inquiry would be at an end. Appellants' containers, however, are instrumentalities of

[8] By taxing property present on the "lien date," California roughly apportions its property tax for mobile goods like containers. For example, if each of appellants' containers is in California for three weeks a year, the number present on any arbitrarily selected date would be roughly 3/52 of the total entering the State that year. Taxing 3/52 of the containers at full value, however, is the same as taxing all the containers at 3/52 value. Thus, California effectively apportions its tax to reflect the containers' "average presence," *i. e.*, the time each container spends in the State per year.

foreign commerce, both as a matter of fact [9] and as a matter of law.[10] The premise of appellees' argument is that the Commerce Clause analysis is identical, regardless of whether interstate or foreign commerce is involved. This premise, we have concluded, must be rejected. When construing Congress' power to "regulate Commerce with foreign Nations," a more extensive constitutional inquiry is required.

When a State seeks to tax the instrumentalities of foreign commerce, two additional considerations, beyond those articulated in *Complete Auto*, come into play. The first is the enhanced risk of multiple taxation. It is a commonplace of constitutional jurisprudence that multiple taxation may well be offensive to the Commerce Clause. *E. g., Evco* v. *Jones*, 409 U. S. 91, 94 (1972); *Central R. Co.* v. *Pennsylvania*, 370 U. S. 607, 612 (1962); *Standard Oil Co.* v. *Peck*, 342 U. S. 382, 384–385 (1952); *Ott*, 336 U. S., at 174; *J. D. Adams Mfg. Co.* v. *Storen*, 304 U. S. 307, 311 (1938). In order to prevent

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[9] As noted above, the trial court found that appellants' containers are "instrumentalities of foreign commerce" that are "used constantly and exclusively for the transportation of cargo for hire in foreign commerce." App. 35, 36.

[10] Appellants' containers entered the United States pursuant to the Customs Convention on Containers, see n. 1, *supra*, which grants containers "temporary admission free of import duties and import taxes and free of import prohibitions and restrictions," provided they are used solely in foreign commerce and are subject to re-exportation. 20 U. S. T., at 304. Similarly, 19 CFR § 10.41a (a)(3) (1978) designates containers "instruments of international traffic," with the result that they "may be released without entry or the payment of duty" under 19 U. S. C. § 1322 (a). See 19 CFR § 10.41a (a)(1) (1978). A bilateral tax Convention between Japan and the United States associates containers with the vehicles that carry them, and provides that income "derived by a resident of a Contracting State . . . from the use, maintenance, and lease of containers and related equipment . . . in connection with the operation in international traffic of ships or aircraft . . . is exempt from tax in the other Contracting State." Convention Between the United States of America and Japan for the Avoidance of Double Taxation, Mar. 8, 1971, [1972] 23 U. S. T. 967, 1084–1085, T. I. A. S. No. 7365.

multiple taxation of interstate commerce, this Court has required that taxes be apportioned among taxing jurisdictions, so that no instrumentality of commerce is subjected to more than one tax on its full value. The corollary of the apportionment principle, of course, is that no jurisdiction may tax the instrumentality in full. "The rule which permits taxation by two or more states on an apportionment basis precludes taxation of all of the property by the state of the domicile. . . . Otherwise there would be multiple taxation of interstate operations." *Standard Oil Co.* v. *Peck*, 342 U. S., at 384–385; *Braniff*, 347 U. S., at 601. The basis for this Court's approval of apportioned property taxation, in other words, has been its ability to enforce full apportionment by all potential taxing bodies.

Yet neither this Court nor this Nation can ensure full apportionment when one of the taxing entities is a foreign sovereign. If an instrumentality of commerce is domiciled abroad, the country of domicile may have the right, consistently with the custom of nations, to impose a tax on its full value.[11] If a State should seek to tax the same instrumentality on an apportioned basis, multiple taxation inevitably results. Hence, whereas the fact of apportionment in interstate commerce means that "multiple burdens logically cannot occur," *Washington Revenue Dept.*, 435 U. S., at 746–747, the same conclusion, as to foreign commerce, logically cannot be drawn. Due to the absence of an authoritative tribunal capable of ensuring that the aggregation of taxes is computed

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[11] Oceangoing vessels, for example, are generally taxed only in their nation of registry; this fact in part explains the phenomenon of "flags of convenience" (a term deemed derogatory in some quarters), whereby vessels are registered under the flags of countries that permit the operation of ships "at a nominal level of taxation." See B. Boczek, Flags of Convenience 5, 56–57 (1962). Aircraft engaged in international traffic, apparently, are likewise "subject to taxation on an unapportioned basis by their country of origin." Note, 11 Stan. L. Rev., *supra* n. 6, at 519, and n. 11. See, *e. g.*, *SAS*, 56 Cal. 3d, at 17, and n. 3, 363 P. 2d, at 28, and n. 3.

on no more than one full value, a state tax, even though "fairly apportioned" to reflect an instrumentality's presence within the State, may subject foreign commerce " 'to the risk of a double tax burden to which [domestic] commerce is not exposed, and which the commerce clause forbids.' " *Evco* v. *Jones,* 409 U. S., at 94, quoting *J. D. Adams Mfg. Co.,* 304 U. S., at 311.

Second, a state tax on the instrumentalities of foreign commerce may impair federal uniformity in an area where federal uniformity is essential. Foreign commerce is preeminently a matter of national concern. "In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power." *Board of Trustees* v. *United States,* 289 U. S. 48, 59 (1933). Although the Constitution, Art. I, § 8, cl. 3, grants Congress power to regulate commerce "with foreign Nations" and "among the several States" in parallel phrases, there is evidence that the Founders intended the scope of the foreign commerce power to be the greater.[12] Cases of this Court, stressing the need for uniformity in treating with other nations, echo this distinction.[13] In approving state taxes on the instrumentalities

[12] *E. g.,* The Federalist No. 42, pp. 279–283 (J. Cooke ed. 1961) (Madison); 3 M. Farrand, The Records of the Federal Convention of 1787, p. 478 (1911) (Madison). See Note, State Taxation of International Air Carriers, 57 Nw. U. L. Rev. 92, 101, and n. 42 (1962); Note, 11 Stan. L. Rev., *supra* n. 6, at 525–526, and n. 29; Abel, The Commerce Clause in the Constitutional Convention and in Contemporary Comment, 25 Minn. L. Rev. 432, 465–475 (1941) (concluding, after an exhaustive survey of contemporary materials: "Despite the formal parallelism of the grants, there is no tenable reason for believing that anywhere nearly so large a range of action was given over commerce 'among the several states' as over that 'with foreign nations.' " *Id.,* at 475).

[13] *E. g., Buttfield* v. *Stranahan,* 192 U. S. 470, 492–493 (1904) ("exclusive and absolute" power of Congress over foreign commerce); *Bowman* v. *Chicago & N. R. Co.,* 125 U. S. 465, 482 (1888) ("It may be argued [that] the inference to be drawn from the absence of legislation by Con-

of interstate commerce, the Court consistently has distinguished oceangoing traffic, *supra*, at 442; these cases reflect an awareness that the taxation of foreign commerce may necessitate a uniform national rule. Indeed, in *Pullman's Palace*, the Court wrote that the " 'vehicles of commerce by water being instruments of intercommunication with other nations, the regulation of them is assumed by the national legislature.' " 141 U. S., at 24, quoting *Railroad Co.* v. *Maryland*, 21 Wall. 456, 470 (1875). Finally, in discussing the Import-Export Clause, this Court, in *Michelin Tire Corp.* v. *Wages*, 423 U. S. 276, 285 (1976), spoke of the Framers' overriding concern that "the Federal Government must speak with one voice when regulating commercial relations with foreign governments." The need for federal uniformity is no less paramount in ascertaining the negative implications of Congress' power to "regulate Commerce with foreign Nations" under the Commerce Clause.[14]

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gress on the subject excludes state legislation affecting commerce with foreign nations more strongly than that affecting commerce among the States. Laws which concern the exterior relations of the United States with other nations and governments are general in their nature, and should proceed exclusively from the legislative authority of the nation"); *Henderson* v. *Mayor of New York*, 92 U. S. 259, 273 (1876) (regulation "must of necessity be national in its character" when it affects "a subject which concerns our international relations, in regard to which foreign nations ought to be considered and their rights respected"); *Gibbons* v. *Ogden*, 9 Wheat. 1, 228–229 (1824) (Johnson, J., concurring). See also *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U. S. 427, 434 (1932). In *National League of Cities* v. *Usery*, 426 U. S. 833 (1976), the Court noted that Congress' power to regulate interstate commerce may be restricted by considerations of federalism and state sovereignty. It has never been suggested that Congress' power to regulate foreign commerce could be so limited.

[14] The policies animating the Import-Export Clause and the Commerce Clause are much the same. In *Michelin*, the Court noted that the Import-Export Clause met three main concerns: "[T]he Federal Government must speak with one voice when regulating commercial relations with foreign governments . . . ; import revenues were to be the major source of revenue

A state tax on instrumentalities of foreign commerce may frustrate the achievement of federal uniformity in several ways. If the State imposes an apportioned tax, international disputes over reconciling apportionment formulae may arise.[15] If a novel state tax creates an asymmetry in the international tax structure, foreign nations disadvantaged by the levy may retaliate against American-owned instrumentalities present in their jurisdictions. Such retaliation of necessity would be directed at American transportation equipment in general, not just that of the taxing State, so that the Nation as a whole would suffer.[16] If other States followed the taxing State's

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of the Federal Government and should not be diverted to the States; and harmony among the States might be disturbed unless seaboard States . . . were prohibited from levying taxes on [goods in transit]." 423 U. S., at 285–286 (footnotes omitted). Abel, see n. 12, *supra*, observed that the Commerce Clause was directed to similar concerns. See 25 Minn. L. Rev., at 448, and n. 67, 452, and n. 81, 456–457, and n. 110 (need to deal in unified manner with foreign nations); *id.*, at 446–451 (need to preserve federal revenue); *id.*, at 448–449, and nn. 69–70, 470–471, 472–473 (need to prevent disharmony among States on account of import duties). In *Washington Revenue Dept.* v. *Association of Wash. Stevedoring Cos.*, 435 U. S. 734 (1978), we noted that the third *Michelin* factor—preserving harmony among the States—mandated the same inquiry as to the effect of a state tax as the Interstate Commerce Clause. See *id.*, at 754–755. In this case, similarly, the first *Michelin* factor—the need to speak with one voice when regulating commercial relations with foreign governments—mandates the same inquiry as to the effect of a state tax as the Foreign Commerce Clause. In *Washington Revenue Dept.*, the Court, holding that the state tax at issue did not prevent "speaking with one voice," noted: "No foreign business or vessel is taxed." 435 U. S., at 754.

[15] See Note, Developments in the Law—Federal Limitations on State Taxation of Interstate Business, 75 Harv. L. Rev. 953, 986 (1962) (noting the difficulty of allocating "international bridge time" for aircraft engaged in international commerce, with consequent risk of multiple taxation from overlapping apportionment formulae, and concluding that apportioned state taxation of foreign-owned aircraft should be forbidden).

[16] Cf. *Chy Lung* v. *Freeman*, 92 U. S. 275, 279 (1876) (invalidating California's bond requirement for Chinese immigrants):

"[I]f this plaintiff and her twenty companions had been subjects of the

example, various instrumentalities of commerce could be subjected to varying degrees of multiple taxation, a result that would plainly prevent this Nation from "speaking with one voice" in regulating foreign commerce.

For these reasons, we believe that an inquiry more elaborate than that mandated by *Complete Auto* is necessary when a State seeks to tax the instrumentalities of foreign, rather than of interstate, commerce. In addition to answering the nexus, apportionment, and nondiscrimination questions posed in *Complete Auto*, a court must also inquire, first, whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation, and, second, whether the tax prevents the Federal Government from "speaking with one voice when regulating commercial relations with foreign governments." If a state tax contravenes either of these precepts, it is unconstitutional under the Commerce Clause.

C

Analysis of California's tax under these principles dictates that the tax, as applied to appellants' containers, is impermissible. Assuming, *arguendo*, that the tax passes muster under *Complete Auto*, it cannot withstand scrutiny under either of the additional tests that a tax on foreign commerce must satisfy.

First, California's tax results in multiple taxation of the instrumentalities of foreign commerce. By stipulation, appellants' containers are owned, based, and registered in Japan; they are used exclusively in international commerce; and they

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Queen of Great Britain, can any one doubt that this matter would have been the subject of international inquiry, if not of a direct claim for redress? Upon whom would such a claim be made? Not upon the State of California; for, by our Constitution, she can hold no exterior relations with other nations. It would be made upon the government of the United States. If that government should get into a difficulty which would lead to war, or to suspension of intercourse, would California alone suffer, or all the Union?"

remain outside Japan only so long as needed to complete their international missions. Under these circumstances, Japan has the right and the power to tax the containers in full. California's tax, however, creates more than the *risk* of multiple taxation; it produces multiple taxation in fact. Appellants' containers not only "are subject to property tax . . . in Japan," App. 32, but, as the trial court found, "are, in fact, taxed in Japan." *Id.*, at 35. Thus, if appellees' levies were sustained, appellants "would be paying a double tax." *Id.*, at 23.[17]

Second, California's tax prevents this Nation from "speaking with one voice" in regulating foreign trade. The desirability of uniform treatment of containers used exclusively in foreign commerce is evidenced by the Customs Convention on Containers, which the United States and Japan have signed. See

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[17] The stipulation of facts, App. 32, like the trial court's finding, *id.*, at 35, states that "[a]ll containers of [appellants] are subject to property tax and are, in fact, taxed in Japan." The record does not further elaborate on the nature of Japan's property tax. Appellants have uniformly insisted, Brief 9; Tr. of Oral Arg. 3, that Japan's property tax is unapportioned, *i. e.*, that it is imposed on the containers' full value, and we so understand the trial court's finding. Although appellees do not seriously challenge this understanding, Brief 10–11, and n. 2, *amicus curiae* Multistate Tax Commission suggests that the record is inadequate to establish double taxation in fact: Japan, *amicus* says, may offer "credits . . . for taxes paid elsewhere." Brief 8. *Amicus* provides no evidence to support this theory. Both the Solicitor General, Brief for United States as *Amicus Curiae* 19 n. 9, and the Department of State, *id.*, at 17a, assure us that Japan taxes appellants' containers at their "full value," and we accept this interpretation of the trial court's factual finding.

Because California's tax in this case creates multiple taxation in fact, we have no occasion here to decide under what circumstances the mere *risk* of multiple taxation would invalidate a state tax, or whether this risk would be evaluated differently in foreign, as opposed to interstate, commerce. Compare *Moorman Mfg. Co.* v. *Bair*, 437 U. S. 267, 276–277 (1978), and *Washington Revenue Dept.*, 435 U. S., at 746, with, *e. g.*, *Central R. Co.* v. *Pennsylvania*, 370 U. S. 607, 615 (1962); *Ott* v. *Mississippi Barge Line Co.*, 336 U. S. 169, 175 (1949); and *Northwest Airlines, Inc.* v. *Minnesota*, 322 U. S. 292, 326 (1944) (Stone, C. J., dissenting).

n. 10, *supra*. Under this Convention, containers temporarily imported are admitted free of "all duties and taxes whatsoever chargeable by reason of importation." 20 U. S. T., at 304. The Convention reflects a national policy to remove impediments to the use of containers as "instruments of international traffic." 19 U. S. C. § 1322 (a). California's tax, however, will frustrate attainment of federal uniformity. It is stipulated that American-owned containers are not taxed in Japan. App. 35. California's tax thus creates an asymmetry in international maritime taxation operating to Japan's disadvantage. The risk of retaliation by Japan, under these circumstances, is acute, and such retaliation of necessity would be felt by the Nation as a whole.[18] If other States follow California's example (Oregon already has done so [19]), foreign-owned containers will be subjected to various degrees of multiple taxation, depending on which American ports they enter. This result, obviously, would make "speaking with one voice" impossible. California, by its unilateral act, cannot be permitted to place these impediments before this Nation's conduct of its foreign relations and its foreign trade.

Because California's ad valorem tax, as applied to appellants' containers, results in multiple taxation of the instrumentalities of foreign commerce, and because it prevents the Federal Government from "speaking with one voice" in international trade, the tax is inconsistent with Congress' power to "regulate

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[18] Retaliation by some nations could be automatic. West Germany's wealth tax statute, for example, provides an exemption for foreign-owned instrumentalities of commerce, but only if the owner's country grants a reciprocal exemption for German-owned instrumentalities. Vermögensteuergesetz (VStG), Art. 1, § 2 (3), reprinted in I Bundesgesetzblatt (BGBl) 950 (Apr. 23, 1974). The European Economic Community (EEC), when apprised of California's tax on foreign-owned containers, apparently determined to consider "suitable counter-measures." Press Release, Council of the European Communities, 521st Council Meeting—Transport (Luxembourg, June 12, 1978), p. 21.

[19] Ore. Op. Atty. Gen. No. 7709 (Jan. 31, 1979) (citing decision below).

Commerce with foreign Nations." We hold the tax, as applied, unconstitutional under the Commerce Clause.

D

Appellees proffer several objections to this holding. They contend, first, that any multiple taxation in this case is attributable, not to California, but to Japan. California, they say, is just trying to take its share; it should not be foreclosed by Japan's election to tax the containers in full. California's tax, however, must be evaluated in the realistic framework of the custom of nations. Japan has the right and the power to tax appellants' containers at their full value; nothing could prevent it from doing so. Appellees' argument may have force in the interstate commerce context. Cf. *Moorman Mfg. Co.* v. *Bair*, 437 U. S. 267, 277, and n. 12 (1978). In interstate commerce, if the domiciliary State is "to blame" for exacting an excessive tax, this Court is able to insist upon rationalization of the apportionment. As noted above, however, this Court is powerless to correct malapportionment of taxes imposed from abroad in foreign commerce.

Appellees contend, secondly, that any multiple taxation created by California's tax can be cured by congressional action or by international agreement. We find no merit in this contention. The premise of appellees' argument is that a State is free to impose demonstrable burdens on commerce, so long as Congress has not pre-empted the field by affirmative regulation. But it long has been "accepted constitutional doctrine that the commerce clause, without the aid of Congressional legislation . . . affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests." *Southern Pacific Co.* v. *Arizona ex rel. Sullivan*, 325 U. S. 761, 769 (1945). Accord, *Hughes* v. *Oklahoma*, *ante*, at

326, and n. 2; *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U. S. 318, 328 (1977). Appellees' argument, moreover, defeats, rather than supports, the cause it aims to promote. For to say that California has created a problem susceptible only of congressional—indeed, only of international—solution is to concede that the taxation of foreign-owned containers is an area where a uniform federal rule is essential. California may not tell this Nation or Japan how to run their foreign policies.

Third, appellees argue that, even if California's tax results in multiple taxation, that fact, after *Moorman*, is insufficient to condemn a state tax under the Commerce Clause. In *Moorman*, the Court refused to invalidate Iowa's single-factor income tax apportionment formula, even though it posed a credible threat of overlapping taxation because of the use of three-factor formulae by other States. See also the several opinions in *Moorman* in dissent. 437 U. S., at 281, 282, and 283. That case, however, is quite different from this one. In *Moorman*, the existence of multiple taxation, on the record then before the Court, was "speculative," *id.*, at 276; on the record of the present case, multiple taxation is a fact. In *Moorman*, the problem arose, not from lack of apportionment, but from mathematical imprecision in apportionment formulae. Yet, this Court consistently had held that the Commerce Clause "does not call for mathematical exactness nor for the rigid application of a particular formula; only if the resulting valuation is palpably excessive will it be set aside." *Northwest Airlines, Inc.* v. *Minnesota*, 322 U. S., at 325 (Stone, C. J., dissenting). Accord, *Moorman*, 437 U. S., at 274 (citing cases). See Hellerstein, State Taxation Under the Commerce Clause: An Historical Perspective, 29 Vand. L. Rev. 335, 347 (1976). This case, by contrast, involves no mere mathematical imprecision in apportionment; it involves a situation where true apportionment does not exist and cannot be policed by this Court at all. *Moorman*, finally, concerned

interstate commerce. This case concerns foreign commerce. Even a slight overlapping of tax—a problem that might be deemed *de minimis* in a domestic context—assumes importance when sensitive matters of foreign relations and national sovereignty are concerned.[20]

Finally, appellees present policy arguments. If California cannot tax appellants' containers, they complain, the State will lose revenue, even though the containers plainly have a nexus with California; the State will go uncompensated for the services it undeniably renders the containers; and, by

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[20] Appellees' reliance on *Bob-Lo Excursion Co.* v. *Michigan*, 333 U. S. 28 (1948), is also misplaced. In that case, the appellant, a Michigan corporation, transported passengers from Detroit to an amusement park on an island in the Province of Ontario; the appellant refused to accept Negro passengers and was prosecuted under a Michigan civil rights statute. In sustaining the statute's application against Commerce Clause attack, the Court emphasized that the appellant conducted "foreign commerce" in name only. The sole business on the island was the amusement park, and it catered solely to American patrons. There were "no established means of access from the Canadian shore to the island," *id.*, at 36, and the island was "economically and socially . . . an amusement adjunct of the city of Detroit." *Id.*, at 35. The "highly closed and localized manner" in which the business was run insulated it "from all commercial or social intercourse and traffic with the people of another country usually characteristic of foreign commerce." *Id.*, at 36. The Court noted that the possibility of conflicting Canadian regulation was "so remote that it [was] hardly more than conceivable," *id.*, at 37, and concluded that, on the facts of the case, it was "difficult to imagine what national interest or policy, whether of securing uniformity in regulating commerce affecting relations with foreign nations or otherwise, could reasonably be found to be adversely affected by applying Michigan's statute to these facts or to outweigh her interest in doing so." *Id.*, at 40.

Bob-Lo is consistent with both the analysis and the result in the present case. Whereas in *Bob-Lo* the risk that foreign commerce would be burdened by inconsistent international regulation was "remote," the risk that foreign commerce will be burdened by international multiple taxation here has been realized in fact. And whereas the Michigan statute posed no threat at all to the Federal Government's ability to "speak with one voice" in regulating foreign trade, the impairment of federal uniformity worked by California's statute is substantial.

exempting appellants' containers from tax, the State in effect will be forced to discriminate against domestic, in favor of foreign, commerce. These arguments are not without weight, and, to the extent appellees cannot recoup the value of their services through user fees, they may indeed be disadvantaged by our decision today. These arguments, however, are directed to the wrong forum. "Whatever subjects of this [the commercial] power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress." *Cooley* v. *Board of Wardens*, 12 How. 299, 319 (1852). The problems to which appellees refer are problems that admit only of a federal remedy. They do not admit of a unilateral solution by a State.

The judgment of the Supreme Court of California is reversed.

It is so ordered.

Substantially for the reasons set forth by Justice Manuel in his opinion for the unanimous Supreme Court of California, 20 Cal. 3d 180, 571 P. 2d 254, MR. JUSTICE REHNQUIST is of the opinion that the judgment of that court should be affirmed.

TOLL, PRESIDENT, UNIVERSITY OF MARYLAND *v.* MORENO ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 77-154. Argued February 22, 1978—Question certified April 19, 1978—Decided April 30, 1979

Respondents, representing a class of nonimmigrant alien residents of Maryland who either held or were financially dependent upon a person who held a "G-4 visa" (a nonimmigrant visa granted to officers or employees of international organizations and members of their immediate families), instituted an action in Federal District Court, challenging the validity of the policy of the University of Maryland whereby "in-state" status for tuition purposes was denied to such aliens because they were conclusively presumed by the University to be nondomiciliaries of the State. The District Court held for respondents and the Court of Appeals affirmed. This Court then certified to the Maryland Court of Appeals the question whether G-4 aliens residing in Maryland are incapable as a matter of state law of becoming domiciliaries of Maryland. *Elkins* v. *Moreno*, 435 U. S. 647. Before the Maryland Court of Appeals answered the certified question in the negative, the University's Board of Regents adopted a resolution reaffirming its policy of denying in-state status to nonimmigrant aliens regardless of whether its policy conformed to the otherwise applicable definition of domicile under Maryland law.

Held: The case will not be restored to this Court's active docket for further briefing and argument, since this Court's decision in *Elkins*, *supra*, rested on the premise that the University apparently has no interest in continuing to deny in-state status to G-4 aliens as a class if they can become Maryland domiciliaries, but this premise no longer appears to be true in view of the resolution subsequently adopted by the Board of Regents. The resolution thus raises new issues of constitutional law which should be addressed in the first instance by the District Court, to which the case is remanded for further consideration.

556 F. 2d 573, vacated and remanded.

PER CURIAM.

This decision supplements *Elkins* v. *Moreno*, 435 U. S. 647 (1978), decided last Term. Respondents in *Elkins* represented a class of nonimmigrant alien residents of Maryland

who either held or were financially dependent upon a person who held a "G–4 visa," that is, a nonimmigrant visa granted to "officers, or employees of . . . international organizations, and the members of their immediate families" pursuant to 8 U. S. C. § 1101 (a)(15)(G)(iv). Respondents were not granted "in-state" status for tuition purposes at the University of Maryland because they were conclusively presumed by the University to be nondomiciliaries of the State. Respondents brought suit against the University and its President, alleging that the University's failure to grant respondents in-state status violated various federal laws, the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and the Supremacy Clause. The District Court held for respondents on the ground that the University's procedures for determining in-state status violated principles established in *Vlandis* v. *Kline,* 412 U. S. 441 (1973), and the Court of Appeals affirmed. *Moreno* v. *University of Maryland,* 420 F. Supp. 541 (Md. 1976), affirmance order, 556 F. 2d 573 (CA4 1977).

In *Elkins* v. *Moreno, supra,* we held that "[b]ecause petitioner makes domicile the 'paramount' policy consideration and because respondents' contention is that they can be domiciled in Maryland but are conclusively presumed to be unable to do so, this case is squarely within *Vlandis* as limited by *Salfi* to those situations in which a State 'purport[s] to be concerned with [domicile, but] at the same time den[ies] to one seeking to meet its test of [domicile] the opportunity to show factors clearly bearing on that issue.' *Weinberger* v. *Salfi,* 422 U. S. [749,] 771 [1975]." 435 U. S., at 660. Since the applicability of *Vlandis* depended on whether respondents could in fact become Maryland domiciliaries, we certified, pursuant to Subtit. 6 of Tit. 12 of the Md. Cts. & Jud. Proc. Code (1974), the following question to the Maryland Court of Appeals:

> "Are persons residing in Maryland who hold or are named in a visa under 8 U. S. C. § 1101 (a)(15)(G)(iv) (1976

ed.), or who are financially dependent upon a person holding or named in such a visa, incapable as a matter of state law of becoming domiciliaries of Maryland?" *Elkins* v. *Moreno, supra,* at 668–669.

On June 23, 1978, approximately two months after the decision in *Elkins,** the Board of Regents of the University of Maryland unanimously adopted "A Resolution Clarifying the Purposes, Meaning, and Application of the Policy of the University of Maryland for Determination of In-State Status for Admission, Tuition, and Charge-Differential Purposes, Insofar as It Denies In-State Status to Nonimmigrant Aliens." In this resolution, the Board of Regents stated, *inter alia:*

> "*Purposes and Interests of In-State Policy.* The Board of Regents finds and declares that the policy approved on September 21, 1973, insofar as it denies in-state status to nonimmigrant aliens, serves a number of substantial purposes and interests, whether or not it conforms to the generally or otherwise applicable definition of domicile under the Maryland common law, including but not limited to:
>
> "(a) limiting the University's expenditures by granting a higher subsidy toward the expenses of providing educational services to that class of persons who, as a class, are more likely to have a close affinity to the State and to contribute more to its economic well-being;
>
> "(b) achieving equalization between the affected classes of the expenses of providing educational services;
>
> "(c) efficiently administering the University's in-state determination and appeals process; and
>
> "(d) preventing disparate treatment among categories of nonimmigrants with respect to admissions, tuition, and charge-differentials.

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*The order certifying the question to the Maryland Court of Appeals was dated April 25, 1978.

> "*Reaffirmation of In-State Policy.* Regardless of whether or not the policy approved by the Board of Regents on September 21, 1973, conforms with the generally or otherwise applicable definition of domicile under the Maryland common law, the Board of Regents reaffirms that policy because it intends and deems it to serve a number of substantial purposes and interests, including but not limited to those set forth above."

On February 21, 1979, the Maryland Court of Appeals unanimously answered our certified question in the negative, stating that "[s]ince nothing in the general Maryland law of domicile renders G–4 visa holders, or their dependents, incapable of becoming domiciled in this State, the answer to the certified question is 'No.'" *Toll* v. *Moreno*, 284 Md. 425, 444, 397 A. 2d 1009, 1019. The Maryland Court of Appeals also declined to consider the implications of the Board of Regents' clarifying resolution, because, although the resolution represented a change of the University's position, the implications of that change were beyond the scope of the certified question. *Id.*, at 436–437, 397 A. 2d, at 1014–1015.

The Attorney General of Maryland now requests that this case "be restored to the Supreme Court's active docket for further briefing and argument . . . ." We must deny this request because the Board of Regents' clarifying resolution has fundamentally altered the posture of the case. Our decision in *Elkins* rests on the premise that "the University apparently has no interest in continuing to deny in-state status to G–4 aliens as a class if they can become Maryland domiciliaries since it has indicated both here and in the District Court that it would redraft its policy 'to accommodate' G–4 aliens were the Maryland courts to hold that G–4 aliens can" acquire such domicile. 435 U. S., at 661. After the clarifying resolution, this premise no longer appears to be true. And if domicile is not the "paramount" policy consideration of the University, this case is no longer "squarely within *Vlandis* as limited by

Salfi . . . ." *Id.*, at 660. The clarifying resolution thus raises new issues of constitutional law which should be addressed in the first instance by the District Court. We therefore vacate the judgment of the Court of Appeals and remand to the District Court for further consideration in light of our opinion and judgment in *Elkins*, the opinion and judgment of the Maryland Court of Appeals in *Toll*, and the Board of Regents' clarifying resolution of June 23, 1978.

So ordered.

SMITH ET AL. *v.* ARKANSAS STATE HIGHWAY EMPLOYEES, LOCAL 1315, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 78–1223. Decided April 30, 1979

Held: The Arkansas State Highway Commission's refusal to consider employee grievances when filed by the union rather than directly by an employee of the State Highway Department does not violate the First Amendment. Even assuming that the Commission's procedure would constitute an unfair labor practice if the Commission were subject to the same labor laws applicable to private employers and that its procedure tends to impair the effectiveness of the union in representing the economic interests of its members, nevertheless, this type of "impairment" is not one that the Constitution forbids, the Commission not having prohibited its employees from joining together in a union, from persuading others to do so, or from advocating any particular ideas.

Certiorari granted; 585 F. 2d 876, reversed.

PER CURIAM.

In grievance proceedings initiated by employees of the Arkansas State Highway Department, the State Highway Commission will not consider a grievance unless the employee submits his written complaint directly to the designated employer representative. The District Court for the Eastern District of Arkansas found that this procedure denied the union representing the employees the ability to submit effective grievances on their behalf and therefore violated the First Amendment. 459 F. Supp. 452 (1978). The United States Court of Appeals for the Eighth Circuit affirmed.[1] 585 F. 2d

[1] This suit was brought by the Arkansas State Highway Employees, Local 1315, and eight of its individual members, after the Commission refused to consider grievances submitted by the union on behalf of two of its members. The facts in these two cases are not in dispute:

"[E]ach employee sent a letter to Local 1315, explaining the nature of their grievance and requesting the union to process the grievances on their

876 (1978). We disagree with these holdings; finding no constitutional violation in the actions of the Commission or its individual members, we grant certiorari and reverse the judgment of the Court of Appeals.

The First Amendment protects the right of an individual to speak freely, to advocate ideas, to associate with others, and to petition his government for redress of grievances. And it protects the right of associations to engage in advocacy on behalf of their members. *NAACP* v. *Button*, 371 U. S. 415 (1963); *Eastern Railroad Presidents Conf.* v. *Noerr Motor Freight, Inc.*, 365 U. S. 127 (1961). The government is prohibited from infringing upon these guarantees either by a general prohibition against certain forms of advocacy, *NAACP* v. *Button*, *supra*, or by imposing sanctions for the expression of particular views it opposes, *e. g.*, *Brandenburg* v. *Ohio*, 395 U. S. 444 (1969); *Garrison* v. *Louisiana*, 379 U. S. 64 (1964).

But the First Amendment is not a substitute for the national labor relations laws. As the Court of Appeals for the Seventh Circuit recognized in *Hanover Township Federation of Teachers* v. *Hanover Community School Corp.*, 457 F. 2d 456 (1972), the fact that procedures followed by a public employer in bypassing the union and dealing directly with its members might well be unfair labor practices were federal statutory law applicable hardly establishes that such procedures violate the Constitution. The First Amendment right

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behalf. In each case the union forwarded the employee's letter to the designated employer's representative and included its own letter stating that it represented the employees and desired to set up a meeting. The employer's representative did not respond to the union's letter. Thereafter each employee filed a written complaint directly with the employer representative. Local 1315 represented each employee at subsequent meetings with the employer representative." 585 F. 2d, at 877.

The individual Commissioners of the Arkansas State Highway Commission and the Director of the State Highway Department were named as defendants, and are the petitioners in this Court.

to associate and to advocate "provides no guarantee that a speech will persuade or that advocacy will be effective." *Id.*, at 461. The public employee surely can associate and speak freely and petition openly, and he is protected by the First Amendment from retaliation for doing so. See *Pickering* v. *Board of Education*, 391 U. S. 563, 574–575 (1968); *Shelton* v. *Tucker*, 364 U. S. 479 (1960). But the First Amendment does not impose any affirmative obligation on the government to listen, to respond or, in this context, to recognize the association and bargain with it.[2]

In the case before us, there is no claim that the Highway Commission has prohibited its employees from joining together in a union, or from persuading others to do so, or from advocating any particular ideas. There is, in short, no claim of retaliation or discrimination proscribed by the First Amendment. Rather, the complaint of the union and its members is simply that the Commission refuses to consider or act upon grievances when filed by the union rather than by the employee directly.

Were public employers such as the Commission subject to the same labor laws applicable to private employers, this refusal might well constitute an unfair labor practice. We may assume that it would and, further, that it tends to impair or undermine—if only slightly [3]—the effectiveness of the union

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[2] See *Hanover Township Federation of Teachers* v. *Hanover Community School Corp.*, 457 F. 2d 456, 461 (CA7 1972), quoting *Indianapolis Education Assn.* v. *Lewallen*, 72 LRRM 2071, 2072 (CA7 1969) ("there is no constitutional duty to bargain collectively with an exclusive bargaining agent").

[3] The union does represent its members at all meetings with employer representatives subsequent to the filing of a written grievance. See n. 1, *supra*. The "impairment" is thus limited to the requirement that written complaints, to be considered, must initially be submitted directly to the employer representative by the employee. There appears to be no bar, however, on the employee's securing any form of advice from his union, or

in representing the economic interests of its members. Cf. *Hanover Township, supra.*

But this type of "impairment" is not one that the Constitution prohibits. Far from taking steps to prohibit or discourage union membership or association, all that the Commission has done in its challenged conduct is simply to ignore the union. That it is free to do.

The judgment of the Court of Appeals is therefore reversed.

It is so ordered.

MR. JUSTICE POWELL took no part in the consideration or decision of this case.

MR. JUSTICE MARSHALL, dissenting.

Now this Court is deciding vital constitutional questions without even a plenary hearing. I dissent.

This Court has long held that the First Amendment protects the right of unions to secure legal representation for their members. *Mine Workers* v. *Illinois State Bar Assn.*, 389 U. S. 217, 221–222 (1967); *Railroad Trainmen* v. *Virginia ex rel. Virginia State Bar*, 377 U. S. 1, 8 (1964); see *Transportation Union* v. *State Bar of Michigan*, 401 U. S. 576 (1971); *NAACP* v. *Button*, 371 U. S. 415 (1963); *Eastern Railroad Presidents Conf.* v. *Noerr Motor Freight, Inc.*, 365 U. S. 127 (1961). Based on this precedent and on Arkansas' recognition of public employees' right to organize and join a union, *Potts* v. *Hay*, 229 Ark. 830, 315 S. W. 2d 826 (1958), the Court of Appeals concluded that the First Amendment also encompasses respondent union's right to file grievances on behalf of its members. If under *Mine Workers* and *Railroad Trainmen* a public employer may not refuse to entertain a grievance submitted by a union-salaried attorney, it is not immediately

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from anyone else. Cf. *Mine Workers* v. *Illinois State Bar Assn.*, 389 U. S. 217 (1967); *Railroad Trainmen* v. *Virginia ex rel. Virginia State Bar*, 377 U. S. 1 (1964).

apparent why the employer in this case should be entitled to reject a grievance asserted by the union itself.

I decline to join a summary reversal that so cavalierly disposes of substantial First Amendment issues.*

*Moreover, summary reversal seems to me an especially inappropriate means of resolving conflicts between the United States Courts of Appeals. Compare *Arkansas State Highway Employees Local 1315* v. *Smith*, 585 F. 2d 876 (CA8 1978), with *Hanover Township Federation of Teachers* v. *Hanover Community School Corp.*, 457 F. 2d 456 (CA7 1972).

WILKINS *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 78-5885. Decided April 30, 1979

Held: Where the *pro se* petitioner's untimely petition for certiorari to review the Court of Appeals' affirmance of petitioner's federal convictions alleges that his court-appointed attorney had failed to file a timely petition as requested by petitioner, this Court will, as suggested by the Solicitor General and even though petitioner did not first seek relief in the Court of Appeals, grant certiorari, vacate the Court of Appeals' judgment, and remand the case to the Court of Appeals for further proceedings, including the re-entry of its judgment affirming petitioner's convictions and, if appropriate, appointment of counsel to assist petitioner in seeking timely review of that judgment in this Court.

Certiorari granted; 559 F. 2d 1210, vacated and remanded.

PER CURIAM.

The *pro se* petitioner was convicted in a Federal District Court on criminal charges, 422 F. Supp. 1371 (ED Pa. 1977), and the Court of Appeals for the Third Circuit affirmed the convictions on June 9, 1977, by judgment order. 559 F. 2d 1210. This petition, filed on December 14, 1978, is therefore 17 months out of time as a conventional petition for certiorari under this Court's Rule 22 (2).

But this is not a conventional petition for certiorari. The petitioner states that he asked his court-appointed lawyer to file a timely petition for certiorari and that in September 1977 he received an assurance from the lawyer that this request had been honored. In July 1978, the petitioner wrote to the Clerk of this Court to inquire about his case and learned that no such petition had ever been filed. He then wrote several letters to his lawyer, but the letters were never answered. All these factual allegations are supported by the petitioner's affidavit and by the affidavits of his wife and his minister.

The petition now before us presents a single question:

> "What remedy is available for petitioner when court-appointed attorney failed and refused to file timely petition for writ of certiorari in defiance of the petitioner's written request that same be done?"

The answer to that question is to be found in the Criminal Justice Act of 1964, 18 U. S. C. §§ 3006A (c), 3006A (d)(6), and 3006A (g). The Solicitor General interprets these provisions to mean that a person whose federal conviction has been affirmed is entitled to a lawyer's help in seeking certiorari here. Indeed, the Courts of Appeals for all of the Circuits provide in their rules or in plans adopted pursuant to the Criminal Justice Act that a court-appointed lawyer must, if his client wishes to seek review in this Court, represent him in filing a petition for certiorari.* Had the petitioner presented his dilemma to the Court of Appeals by way of a motion for the appointment of counsel to assist him in seeking review here, the court then could have vacated its judgment affirming the convictions and entered a new one, so that this petitioner, with the assistance of counsel, could file a timely petition for certiorari. Cf. *Doherty* v. *United States*, 404 U. S. 28 (1971); *Schreiner* v. *United States*, 404 U. S. 67 (1971).

The Solicitor General has recommended that we grant cer-

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*The Criminal Justice Act Plan adopted by the Court of Appeals for the Third Circuit provides:

"If, after an adverse decision by the Court of Appeals, a review by the Supreme Court of the United States is to be sought, the appointed attorney shall prepare a petition for certiorari and other necessary and appropriate documents in connection therewith." See A Plan for the United States Court of Appeals for the Third Judicial Circuit Pursuant to the Criminal Justice Act of 1964, § III–6 (effective Sept. 1, 1971).

For comparable provisions or rules in effect in other Circuits, see generally United States Courts of Appeals Rules, 28 U. S. C. A. (Supp. 1978). See also plans under the Criminal Justice Act adopted by the Courts of Appeals for the Fourth, the Seventh, and the District of Columbia Circuits.

tiorari, vacate the judgment, and remand this case to the Court of Appeals so that a timely petition for certiorari to review the appellate judgment can be filed. Even though this petitioner, unlike the claimants in the *Doherty* and *Schreiner* cases, did not first apply to the Court of Appeals for relief, we agree with the suggestion of the Solicitor General.

The Court of Appeals, the Solicitor General, and this Court all have a strong interest in ensuring that lawyers appointed to aid indigents discharge their responsibilities fairly. Yet this prisoner's story of his appointed lawyer's indifference to his legitimate request for help is all too familiar. The petitioner's decision to apply directly to this Court for relief is under these circumstances understandable. Accordingly, the motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted, the judgment of the Court of Appeals is vacated, and the case is remanded to the Court of Appeals for further proceedings, including the reentry of its judgment affirming the petitioner's convictions and, if appropriate, appointment of counsel to assist the petitioner in seeking timely review of that judgment in this Court.

It is so ordered.

Petitioner having made no substantive challenge to the judgment of the Court of Appeals in his petition for certiorari, MR. JUSTICE REHNQUIST dissents from the Court's action in vacating that judgment.

Because MR. JUSTICE STEVENS believes the Court of Appeals is the forum in which petitioner's allegations should be evaluated in the first instance, he would not vacate that court's judgment summarily.

MR. JUSTICE POWELL took no part in the decision of this case.

Syllabus

BURKS ET AL. *v.* LASKER ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 77–1724. Argued January 17, 1979—Decided May 14, 1979

Respondents, shareholders of an investment company registered under the Investment Company Act of 1940 (ICA), brought this derivative suit in Federal District Court against several of the company's directors and its registered investment adviser, alleging that the defendants had violated their duties under the ICA, the Investment Advisers Act of 1940 (IAA), and the common law in connection with a purchase by the company of the commercial paper of another company. The investment company's five directors who were neither affiliated with the investment adviser nor defendants in the action, acting as a quorum pursuant to the company's bylaws, concluded that continuation of the litigation was contrary to the best interests of the company and its shareholders and moved the District Court to dismiss the action. Finding no evidence that the directors who voted to terminate the suit had acted other than independently and in good faith, the District Court entered summary judgment against respondents. The Court of Appeals reversed, holding that because of the ICA, disinterested directors of an investment company have no power to foreclose the continuation of nonfrivolous litigation brought by shareholders against majority directors for breach of their fiduciary duties.

Held: In suits alleging violations of the ICA and IAA, federal courts should, as a matter of federal law, apply state law governing the authority of independent directors to discontinue derivative suits to the extent such law is consistent with the policies of the ICA and the IAA. Congress did not require that States, or federal courts, absolutely forbid director termination of all nonfrivolous actions. Pp. 475–486.

(a) Assuming, without deciding, that respondents have implied, derivative causes of action under the federal Acts, state law cannot operate of its own force. Instead, "the overriding federal law applicable here would, *where the facts required,* control the appropriateness of redress despite the provisions of state corporation law . . . ." *J. I. Case Co.* v. *Borak,* 377 U. S. 426, 434 (emphasis added). Pp. 475–477.

(b) The fact that the scope of respondents' federal right is a federal question does not, however, make state law irrelevant. Since the ICA does not purport to be the source of authority for managerial power

but instead functions primarily to impose controls and restrictions on the internal management of investment companies, the ICA and the IAA do not require that federal law displace state laws governing the powers of directors unless the state laws permit action prohibited by the Acts, or unless "their application would be inconsistent with the federal policy underlying the cause of action . . . ." *Johnson* v. *Railway Express Agency*, 421 U. S. 454, 465. Pp. 477–480.

(c) Thus, the threshold inquiry in this case (not determined by either of the courts below) should have been to determine whether state law permitted the disinterested directors to terminate respondents' suit; if so, the next inquiry should have been whether such a state rule was consistent with the policy of the federal Acts. The Court of Appeals incorrectly implied that the only state law that would be consistent with the ICA would be one which absolutely prohibited the termination of nonfrivolous derivative suits. Although the Acts may justify some restraints upon the unfettered discretion of even disinterested mutual fund directors, they do not justify a flat rule that directors may never terminate nonfrivolous actions involving codirectors. The structure and purpose of the ICA indicate that Congress entrusted to the independent directors of investment companies, exercising the authority granted to them by state law, the primary responsibility for looking after the interests of the funds' shareholders. There may be situations in which the independent directors could reasonably believe that the best interests of the shareholders call for a decision not to sue—as, for example, where the costs of litigation to the corporation outweigh any potential recovery. In such cases, it would be consistent with the Act to allow the independent directors to terminate a suit, even though not frivolous. Pp. 480–485.

567 F. 2d 1208, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. BLACKMUN, J., filed a concurring opinion, *post*, p. 486. STEWART, J., filed an opinion concurring in the judgment, in which POWELL, J., joined, *post*, p. 487. REHNQUIST, J., took no part in the consideration or decision of the case.

Daniel A. Pollack argued the cause for petitioners. With him on the briefs were *Martin I. Kaminsky, Leonard Joseph, John M. Friedman, Jr., Eugene P. Souther,* and *Anthony R. Mansfield.*

Joseph H. Einstein argued the cause for respondents. With him on the brief were *Steven Mallis, Leonard Holland,* and *David J. Sweet.*

Ralph C. Ferrara argued the cause for the Securities and Exchange Commission as *amicus curiae* urging reversal. With him on the brief were *Solicitor General McCree, Stephen M. Shapiro,* and *Jacob H. Stillman.**

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question presented in this case is whether the disinterested directors of an investment company may terminate a stockholders' derivative suit brought against other directors under the Investment Company and Investment Advisers Acts of 1940, 15 U. S. C. § 80a–1 *et seq.;* 15 U. S. C. § 80b–1 *et seq.* To decide that question, we must determine the appropriate roles of federal and state law in such a controversy.

Respondents, shareholders of Fundamental Investors, Inc., an investment company registered under the Investment Company Act, brought this derivative suit in February 1973 in the District Court for the Southern District of New York. The action was brought against several members of the company's board of directors and its registered investment adviser, Anchor Corp. The complaint alleged that the defendants had violated their duties under the Investment Company Act (ICA),[1] the Investment Advisers Act (IAA),[2] and the common law in connection with the 1969 purchase by the corporation of $20 million in Penn Central Transportation Co. commercial

*Briefs of *amici curiae* urging reversal were filed by *G. Duane Vieth, Paul S. Ryerson,* and *Meyer Eisenberg* for the Investment Company Institute, and by *John E. Tobin, Roger W. Kapp,* and *Richard H. Sayler* for Investors Diversified Services, Inc.

[1] § 13 (a)(3), 54 Stat. 811, as amended, 15 U. S. C. § 80a–13 (a)(3), and former § 36, 54 Stat. 841, 15 U. S. C. § 80a–35 (1964 ed.).

[2] § 206, 54 Stat. 852, as amended, 15 U. S. C. § 80b–6.

paper.[3] In response to the suit, Fundamental's board of directors determined that the five of its members who were neither affiliated with the investment adviser[4] nor defendants in the action would decide what position the company should take in the case. On the basis of outside counsel's recommendation and their own investigation, the five, acting as a quorum pursuant to the company's bylaws, concluded that continuation of the litigation was contrary to the best interests of the company and its shareholders and moved the District Court to dismiss the action.

The District Court held that under the so-called "business judgment rule," a quorum of truly disinterested and independent directors has authority to terminate a derivative suit which they in good faith conclude is contrary to the com-

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[3] The complaint alleged, *inter alia*, that "Anchor breached its statutory, contractual and common law fiduciary duties by relying exclusively upon the representations of *Goldman, Sachs & Co.* (a seller of commercial paper), rather than independently investigating the quality and safety of the Penn Central 270-day notes purchased by the Fund. It is further alleged that the defendant directors knew or should have known of Anchor's failure to meet its responsibility; that they violated their . . . duties as corporate fiduciaries by acquiescing in Anchor's omissions; that the financial condition of the Penn Central steadily worsened during the period from November 28, 1969 to June 21, 1970, the date that it filed for reorganization; and that during this period of decline all of the defendants failed to investigate and review the financial condition of the Penn Central and the quality and safety of its commercial paper." 426 F. Supp. 844, 847 (1977).

[4] The five were "disinterested" within the meaning of the ICA (see 567 F. 2d 1208, 1209 (CA2 1978)) which provides:

"No registered investment company shall have a board of directors more than 60 per centum of the members of which are persons who are interested persons of such registered company." 15 U. S. C. § 80a–10 (a).

The definition of "interested person" is found at 15 U. S. C. § 80a–2 (a)(19). See n. 12, *infra*.

Of the remaining six directors, five were defendants in the *Lasker* suit, and one was a director of the investment adviser. 404 F. Supp. 1172, 1175 (1975).

pany's best interests. 404 F. Supp. 1172 (1975). After permitting discovery on the question of the directors' independence, the District Court entered summary judgment against respondents, finding no evidence that the directors who voted to terminate the suit had acted other than independently and in good faith. 426 F. Supp. 844 (1977). The Court of Appeals for the Second Circuit reversed, 567 F. 2d 1208, 1212 (1978), holding that as a consequence of the ICA, "disinterested directors of an investment company do not have the power to foreclose the continuation of nonfrivolous litigation brought by shareholders against majority directors for breach of their fiduciary duties." We granted certiorari, 439 U. S. 816 (1978). We reverse.

I

A fundamental issue in this case is which law—state or federal—governs the power of the corporation's disinterested directors to terminate this derivative suit. The first step in making that determination is to ascertain which law creates the cause of action alleged by the plaintiffs. Neither the ICA nor the IAA—the plaintiff's two federal claims—expressly creates a private cause of action for violation of the sections relevant here. However, on the basis of District and Circuit precedent, the courts below assumed that an implied private right of action existed under each Act. *Brown* v. *Bullock*, 194 F. Supp. 207, 222–228 (SDNY), aff'd, 294 F. 2d 415 (CA2 1961) (en banc) (ICA); *Abrahamson* v. *Fleschner*, 568 F. 2d 862 (CA2 1977) (IAA); *Bolger* v. *Laventhol, Krekstein, Horwath & Horwath*, 381 F. Supp. 260 (SDNY 1974) (IAA). The two courts also sanctioned the bringing of the suit in derivative form, apparently assuming that, as we held in *J. I. Case Co.* v. *Borak*, 377 U. S. 426, 432 (1964), "[t]o hold that derivative actions are not within the sweep of the [right] would . . . be tantamount to a denial of private relief." As petitioners never disputed the existence of private, derivative causes of action under the Acts, and as in this Court all agree

that the question has not been put in issue, Brief for Petitioners 28; Brief for Respondents 15, we shall assume without deciding that respondents have implied, derivative causes of action under the ICA and IAA.[5]

Since we proceed on the premise of the existence of a federal cause of action, it is clear that "our decision is not controlled by *Erie R. Co.* v. *Tompkins*, 304 U. S. 64," and state law does not operate of its own force. *Sola Electric Co.* v. *Jefferson Co.*, 317 U. S. 173, 176 (1942). See *Board of Comm'rs* v. *United States*, 308 U. S. 343, 349–350 (1939); *Deitrick* v. *Greaney*, 309 U. S. 190, 200 (1940); C. Wright, Federal Courts 284 (3d ed. 1976); Mishkin, The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision, 105 U. Pa. L. Rev. 797, 799–800 (1957); Hart, The Relations Between State and Federal Law, 54 Colum. L. Rev. 489, 529 (1954); 2 L. Loss, Securities Regulation 971 (2d ed. 1961). Rather, "[w]hen a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted." *Sola*

[5] The question whether a cause of action exists is not a question of jurisdiction, and therefore may be assumed without being decided. Cf. *Mt. Healthy City Board of Ed.* v. *Doyle*, 429 U. S. 274, 279 (1977); *Bell* v. *Hood*, 327 U. S. 678, 682 (1946). Other Courts of Appeals have agreed with the Second Circuit that the ICA and IAA create private causes of action. As to the ICA, see *Moses* v. *Burgin*, 445 F. 2d 369, 373 (CA1 1971); *Esplin* v. *Hirschi*, 402 F. 2d 94, 103 (CA10 1968). See also *Herpich* v. *Wallace*, 430 F. 2d 792, 815 (CA5 1970); *Taussig* v. *Wellington Fund, Inc.*, 313 F. 2d 472, 476 (CA3 1963). Compare *Greater Iowa Corp.* v. *McLendon*, 378 F. 2d 783, 793 (CA8 1967), with *Brouk* v. *Managed Funds, Inc.*, 286 F. 2d 901 (CA8 1961), vacated as moot, 369 U. S. 424 (1962). As to the IAA, see *Lewis* v. *Transamerica Corp.*, 575 F. 2d 237 (CA9), cert. granted *sub nom. Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 439 U. S. 952 (1978); *Wilson* v. *First Houston Investment Corp.*, 566 F. 2d 1235 (CA5 1978).

Electric Co. v. *Jefferson Co., supra,* at 176. See *Tunstall* v. *Locomotive Firemen & Enginemen,* 323 U. S. 210, 213 (1944); *Board of Comm'rs* v. *United States, supra.* Cf. *United States* v. *Kimbell Foods, Inc.,* 440 U. S. 715, 726–727 (1979); *Butner* v. *United States,* 440 U. S. 48 (1979). Legal rules which impact significantly upon the effectuation of federal rights must, therefore, be treated as raising federal questions. See *Robertson* v. *Wegmann,* 436 U. S. 584, 588 (1978) (statute of limitations); *Auto Workers* v. *Hoosier Corp.,* 383 U. S. 696, 701 (1966) (same); *J. I. Case Co.* v. *Borak, supra,* at 435 (security for expenses statute); *Sola Electric Co.* v. *Jefferson Co., supra,* at 176 (rules of estoppel); *Deitrick* v. *Greaney, supra,* at 200 (affirmative defense to federal claim). See generally Friendly, In Praise of *Erie*—and of the New Federal Common Law, 39 N. Y. U. L. Rev. 383, 408 (1964); Hill, State Procedural Law in Federal Nondiversity Litigation, 69 Harv. L. Rev. 66, 92–93 (1955). Thus, "the overriding federal law applicable here would, *where the facts required,* control the appropriateness of redress despite the provisions of state corporation law . . . ." *J. I. Case Co.* v. *Borak, supra,* at 434 (emphasis added).

II

The fact that "the scope of [respondents'] federal right is, of course, a federal question" does not, however, make state law irrelevant. *De Sylva* v. *Ballentine,* 351 U. S. 570, 580 (1956). Cf. *United States* v. *Kimbell Foods, Inc., supra,* at 727–728. It is true that in certain areas we have held that federal statutes authorize the federal courts to fashion a complete body of federal law. See *Textile Workers* v. *Lincoln Mills,* 353 U. S. 448, 451, 456–457 (1957). Corporation law, however, is not such an area.

A derivative suit is brought by shareholders to enforce a claim on behalf of the corporation. See Note, The Demand and Standing Requirements in Stockholder Derivative Actions, 44 U. Chi. L. Rev. 168 (1976). This case involves the ques-

tion whether directors are authorized to determine that certain claims not be pursued on the corporation's behalf. As we have said in the past, the first place one must look to determine the powers of corporate directors is in the relevant State's corporation law. See *Santa Fe Industries, Inc.* v. *Green*, 430 U. S. 462, 479 (1977); *Cort* v. *Ash*, 422 U. S. 66, 84 (1975). "Corporations are creatures of state law," *ibid.*, and it is state law which is the font of corporate directors' powers. By contrast, federal law in this area is largely regulatory and prohibitory in nature—it often limits the exercise of directorial power, but only rarely creates it. Cf. *Price* v. *Gurney*, 324 U. S. 100, 107 (1945). In short, in this field congressional legislation is generally enacted against the background of existing state law; Congress has never indicated that the entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action is based upon a federal statute. *Cort* v. *Ash*, *supra*; *Santa Fe Industries, Inc.* v. *Green*, *supra*. See *United Copper Securities Co.* v. *Amalgamated Copper Co.*, 244 U. S. 261, 264 (1917). Cf. *United States* v. *Yazell*, 382 U. S. 341, 352–353 (1966) (state family law); *De Sylva* v. *Ballentine*, *supra*, at 580 (same); P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, The Federal Courts and The Federal System 470–471 (1973 ed.).

Federal regulation of investment companies and advisers is not fundamentally different in this respect. Mutual funds, like other corporations, are incorporated pursuant to state, not federal, law. Although the Court of Appeals found it significant that "nothing in . . . the legislation regulating investment companies and their advisers . . . suggests that . . . disinterested directors . . . have the power to terminate litigation brought by mutual fund stockholders . . . ," 567 F. 2d, at 1210, such silence was to be expected. The ICA does not purport to be the source of authority for managerial power; rather, the Act functions primarily to "impos[e] *controls and restrictions* on the internal management of investment companies." *United*

States v. *National Assn. of Securities Dealers*, 422 U. S. 694, 705 n. 13 (1975) (emphasis added).

The ICA and IAA, therefore, do not require that federal law displace state laws governing the powers of directors unless the state laws permit action prohibited by the Acts, or unless "their application would be inconsistent with the federal policy underlying the cause of action . . . ." *Johnson* v. *Railway Express Agency*, 421 U. S. 454, 465 (1975).[6] Cf. *Robertson* v. *Wegmann*, *supra*, at 590; *Auto Workers* v. *Hoosier Corp.*, *supra*, at 706–707; *Sola Electric Co.* v. *Jefferson Co.*, 317 U. S., at 176. Although "[a] state statute cannot be considered 'inconsistent' with federal law merely because the statute causes the plaintiff to lose the litigation," *Robertson* v. *Wegmann*, *supra*, at 593, federal courts must be ever vigilant to insure that application of state law poses "no significant threat to any identifiable federal policy or interest . . . ." *Wallis* v. *Pan American Petroleum Corp.*, 384 U. S. 63, 68 (1966). See *Auto Workers* v. *Hoosier Corp.*, *supra*, at 702. Cf. *Brown* v. *Western R. Co. of Alabama*, 338 U. S. 294, 298 (1949). And, of course, this means that "unreasonable," *Wallis* v. *Pan American Petroleum Corp.*, *supra*, at 70, or "specific aberrant or hostile state rules," *United States* v. *Little Lake Misere Land Co.*, 412 U. S. 580, 596 (1973), will not

[6] This is not a situation where federal policy requires uniformity and, therefore, where the very application of varying state laws would itself be inconsistent with federal interests. In enacting the ICA and IAA, Congress did declare that "the activities of such companies, extending over many States, . . . make difficult, if not impossible, effective State regulation of such companies . . . ." 15 U. S. C. § 80a–1 (a)(5). But as long as private causes of action are available in federal courts for violation of the federal statutes, this enforcement problem is obviated. The real concern, therefore, is not that state laws be uniform, but rather that the laws applied in suits brought to enforce federal rights meet the standards necessary to insure that the "prohibition of [the] federal statute . . . not be set at naught," *Sola Electric Co.* v. *Jefferson Co.*, 317 U. S. 173, 176 (1942). The "consistency" requirement described in text guarantees that state laws failing to meet these standards will be precluded.

be applied. See, *e. g.*, *Levitt* v. *Johnson*, 334 F. 2d 815, 819–820 (CA1 1964). The "consistency" test guarantees that "[n]othing that the state can do will be allowed to destroy the federal right," *Board of Comm'rs* v. *United States*, 308 U. S., at 350, and yet relieves federal courts of the necessity to fashion an entire body of federal corporate law out of whole cloth.

III

The foregoing indicates that the threshold inquiry for a federal court in this case should have been to determine whether state law permitted Fundamental's disinterested directors to terminate respondents' suit. If so, the next inquiry should have been whether such a state rule was consistent with the policy of the ICA and IAA. Neither the District Court nor the Court of Appeals decided the first question, apparently because neither considered state law particularly significant in determining the authority of the independent directors to terminate the action.[7] And in that circumstance, neither court addressed the question of inconsistency between state and federal law. At least implicitly, however, the Court of Appeals did make a related determination. Its holding that nonfrivolous derivative suits may never be terminated makes manifest its view that no other rule—whether state or federal—would be consistent with the ICA.[8] We disagree.

The Court of Appeals correctly noted, 567 F. 2d, at 1210–1211, that Congress was concerned about the potential for abuse inherent in the structure of investment companies. A mutual fund is a pool of assets, consisting primarily of portfolio securities, and belonging to the individual investors holding shares in the fund. *Tannenbaum* v. *Zeller*, 552 F. 2d 402, 405 (CA2 1977). Congress was concerned because

"[m]utual funds, with rare exception, are not operated

[7] See 567 F. 2d 1208 (CA2 1978); 404 F. Supp. 1172 (SDNY 1975).

[8] The Court of Appeals did not undertake any separate analysis of the policy behind the ICA's companion statute, the IAA.

> by their own employees. Most funds are formed, sold, and managed by external organizations, [called 'investment advisers,'] that are separately owned and operated. . . . The advisers select the funds' investments and operate their businesses. . . .
>
> "Since a typical fund is organized by its investment adviser which provides it with almost all management services . . . , a mutual fund cannot, as a practical matter sever its relationship with the adviser. Therefore, the forces of arm's-length bargaining do not work in the mutual fund industry in the same manner as they do in other sectors of the American economy." S. Rep. No. 91–184, p. 5 (1969).

As a consequence, "[t]he relationship between investment advisers and mutual funds is fraught with potential conflicts of interest," *Galfand* v. *Chestnutt Corp.*, 545 F. 2d 807, 808 (CA2 1976). See generally S. Rep. No. 91–184, *supra*, at 5; H. R. Rep. No. 2337, 89th Cong., 2d Sess., 9, 45–46, 64 (1966); H. R. Doc. No. 136, 77th Cong., 1st Sess., 2485–2490, 2569, 2579–2580, 2775 (1942); Hearings before a Subcommittee of the House Committee on Interstate and Foreign Commerce on H. R. 10065, 76th Cong., 3d Sess., 58–59 (1940); Securities and Exchange Commission, Report on Investment Trusts and Investment Companies, pt. 3, pp. 1–49 (1940); 15 U. S. C. § 80a–1 (b) (findings and declaration of policy).[9] Yet, while these potential conflicts may justify some restraints upon the unfettered discretion of even disinterested mutual fund directors, particularly in their transactions with the investment adviser,[10] they hardly justify a flat rule that directors may

[9] See also *Tannenbaum* v. *Zeller*, 552 F. 2d 402, 405 (CA2 1977); Radmer, Duties of the Directors of Investment Companies, 3 J. Corp. L. 61, 63 (1977); Note, 47 Ford. L. Rev. 568 (1979).

[10] See, *e. g.*, § 36 of the ICA, 54 Stat. 841, as amended, 15 U. S. C. § 80a–35, and § 206 of the IAA, 54 Stat. 852, as amended, 15 U. S. C. § 80b–6, imposing minimum standards on the behavior of investment company directors and advisers which presumably apply as much to their

never terminate nonfrivolous derivative actions involving co-directors. In fact, the evidence is overwhelming that Congress did not intend to require any such absolute rule.

The cornerstone of the ICA's effort to control conflicts of interest within mutual funds is the requirement that at least 40% of a fund's board be composed of independent outside directors.[11] 15 U. S. C. § 80a–10 (a). As originally enacted, § 10 of the Act required that these 40% not be officers or employees of the company or "affiliated persons" of its adviser. 54 Stat. 806. In 1970, Congress amended the Act to strengthen further the independence of these directors, adding the stricter requirement that the outside directors not be "interested persons." See 15 U. S. C. §§ 80a–10 (a), 80a–2 (a)(19).[12] To these statutorily disinterested directors, the

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decisions regarding litigation as to the other decisions they may be called upon to make. See *Santa Fe Industries, Inc.* v. *Green*, 430 U. S. 462, 471 n. 11 (1977) ("Congress intended the Investment Advisers Act to establish federal fiduciary standards for investment advisers"); *SEC* v. *Capital Gains Research Bureau*, 375 U. S. 180, 191–192 (1963); *Cramer* v. *General Tel. & Electronics Corp.*, 582 F. 2d 259, 275 (CA3 1978); *Tannenbaum* v. *Zeller*, *supra*, at 418–419.

[11] Under certain circumstances, independent directors must constitute a majority rather than 40% of the board. See 15 U. S. C. § 80a–10 (b).

[12] Title 15 U. S. C. § 80a–2 (a)(19) defines an "'interested person' of another person . . . when used with respect to an investment company," as

"(i) any affiliated person of such company,

"(ii) any member of the immediate family of any natural person who is an affiliated person of such company,

"(iii) any interested person of any investment adviser of or principal underwriter for such company,

"(iv) any person or partner or employee of any person who at any time since the beginning of the last two fiscal years of such company has acted as legal counsel for such company,

"(v) any broker or dealer registered under the Securities Exchange Act of 1934 or any affiliated person of such a broker or dealer, and

"(vi) any natural person whom the Commission by order shall have determined to be an interested person by reason of having had, at any time since the beginning of the last two fiscal years of such company, a material business or professional relationship with such company or with

Act assigns a host of special responsibilities involving supervision of management and financial auditing. They have the duty to review and approve the contracts of the investment adviser and the principal underwriter, 15 U. S. C. § 80a–15 (c); the responsibility to appoint other disinterested directors to fill vacancies resulting from the assignment of the advisory contracts, 15 U. S. C. § 80a–16 (b); and are required to select the accountants who prepare the company's Securities and Exchange Commission financial filings, 15 U. S. C. § 80a–31 (a).

Attention must be paid as well to what Congress did *not* do. Congress consciously chose to address the conflict-of-interest problem through the Act's independent-directors section, rather than through more drastic remedies such as complete disaffiliation of the companies from their advisers or compulsory internalization of the management function. See Report of the SEC on the Public Policy Implications of Investment Company Growth, H. R. Rep. No. 2337, 89th Cong., 2d Sess., 147–148 (1966). Congress also decided *not* to incorporate into the 1940 Act a provision, proposed by the

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the principal executive officer of such company or with any other investment company having the same investment adviser or principal underwriter or with the principal executive officer of such other investment company."

Title 15 U. S. C. § 80a–2 (a) (2) states that " '[a]ffiliated company' means a company which is an affiliated person," and 15 U. S. C. § 80a–2 (a) (3) defines " 'affiliated person' of another person" as

"(A) any person directly or indirectly owning, controlling, or holding with power to vote, 5 per centum or more of the outstanding voting securities of such other person; (B) any person 5 per centum or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by such other person; (C) any person directly or indirectly controlling, controlled by, or under common control with, such other person; (D) any officer, director, partner, copartner, or employee of such other person; (E) if such other person is an investment company, any investment adviser thereof or any member of an advisory board thereof; and (F) if such other person is an unincorporated investment company not having a board of directors, the depositor thereof."

SEC, that would have forced investment companies to seek court approval before settling claims against "insiders" that could be the target of derivative suits. See S. 3580, 76th Cong., 3d Sess., § 33 (a) (1940); *Wolf* v. *Barkes*, 348 F. 2d 994, 997 n. 4 (CA2 1965). And when Congress did intend to prevent board action from cutting off derivative suits, it said so expressly. Section 36 (b), 84 Stat. 1428, 15 U. S. C. § 80a–35 (b)(2), added to the Act in 1970, performs precisely this function for derivative suits charging breach of fiduciary duty with respect to adviser's fees.[13] No similar provision exists for derivative suits of the kind involved in this case.

Congress' purpose in structuring the Act as it did is clear. It "was designed to place the unaffiliated directors in the role of 'independent watchdogs,'" *Tannenbaum* v. *Zeller*, 552 F. 2d, at 406, who would "furnish an independent check upon the management" of investment companies, Hearings on H. R. 10065 before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 76th Cong., 3d Sess., 109 (1940). This "watchdog" control was chosen in preference to the more direct controls on behavior exemplified by the options not adopted. Indeed, when by 1970 it appeared that the "affiliated person" provision of the 1940 Act might not be adequately restraining conflicts of interest, Congress turned not to direct controls, but rather to stiffening the requirement of independence as the way to "remedy the act's deficiencies." S. Rep. No. 91–184, pp. 32–33 (1969).[14] Without question, "[t]he function of these provisions with respect to unaffiliated directors [was] to supply an independent check on management and to provide a means for the representation of shareholder interests in investment company affairs." *Id.*, at 32.

In short, the structure and purpose of the ICA indicate that

[13] See also § 16 (b) of the Securities Exchange Act of 1934, 15 U. S. C. § 78p (b), which authorizes shareholder suits to recover insider "short swing" profits on behalf of the company notwithstanding the decision of the board of directors not to sue.

[14] See n. 12, *supra*.

Congress entrusted to the independent directors of investment companies, exercising the authority granted to them by state law, the primary responsibility for looking after the interests of the funds' shareholders.[15] There may well be situations in which the independent directors could reasonably believe that the best interests of the shareholders call for a decision not to sue—as, for example, where the costs of litigation to the corporation outweigh any potential recovery. See Note, 47 Ford. L. Rev. 568, 580 (1979); Note, 44 U. Chi. L. Rev., at 196. See, *e. g., Tannenbaum* v. *Zeller, supra,* at 418; *Cramer* v. *General Tel. & Electronics Corp.,* 582 F. 2d 259, 275 (CA3 1978). In such cases, it would certainly be consistent with the Act to allow the independent directors to terminate a suit, even though not frivolous. Indeed, it would have been paradoxical for Congress to have been willing to rely largely upon "watchdogs" to protect shareholder interests and yet, where the "watchdogs" have done precisely that, require that they be totally muzzled.[16]

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[15] As an adjunct to its main argument which rested upon the structure of the ICA, the Court of Appeals was also of the view that mutual fund directors can never be truly disinterested in suits involving their co-directors. 567 F. 2d, at 1212. While lack of impartiality may or may not be true as a matter of fact in individual cases, it is not a conclusion of law required by the ICA. Congress surely would not have entrusted such critical functions as approval of advisory contracts and selection of accountants to the statutorily disinterested directors had it shared the Court of Appeals' view that such directors could never be "disinterested" where their codirectors or investment advisers were concerned. In fact, although it was speaking only of the statutory definition, Congress declared in the second section of the Act that "no person shall be deemed to be an interested person of an investment company solely by reason of . . . his being a member of its board of directors or advisory board . . . ." 15 U. S. C. § 80a–2 (a)(19). See also 15 U. S. C. § 80a–2 (a)(9) ("A natural person shall be presumed not to be a controlled person within the meaning of this subchapter").

[16] As an alternative ground in support of the judgment below, respondents urge that Fed. Rule Civ. Proc. 23.1 prohibits termination of this derivative action. That Rule states that a derivative action "shall not be

IV

We hold today that federal courts should apply state law governing the authority of independent directors to discontinue derivative suits to the extent such law is consistent with the policies of the ICA and IAA. Moreover, we hold that Congress did not require that States, or federal courts, absolutely forbid director termination of all nonfrivolous actions. However, since "[w]e did not grant certiorari to decide [a question of state law]," *Butner* v. *United States,* 440 U. S. 48, 51 (1979), and since neither the District Court nor the Court of Appeals decided the point,[17] the case is reversed and remanded for further proceedings consistent with this opinion. *Butner* v. *United States; Wallis* v. *Pan American Petroleum Corp.,* 384 U. S., at 72.

Reversed and remanded.

MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. JUSTICE BLACKMUN, concurring.

I join the Court's opinion and its judgment. In so doing, I read that opinion to hold that on remand the Court of Appeals is free to determine and, indeed, should determine what the state law in this area requires, and then whether that state law is consistent with the policies of the Investment Company

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dismissed or compromised without the approval of the court . . . ." However, as Judge Friendly noted with respect to former Rule 23 (c), those words apply only to voluntary settlements between derivative plaintiffs and defendants, and were intended to prevent plaintiffs from selling out their fellow shareholders. They do not apply where the plaintiffs' action is involuntarily dismissed by a court, as occurred in this case. *Wolf* v. *Barkes,* 348 F. 2d 994, 996–997 (CA2 1965). The same is true of the identically worded Rule 23.1. See C. Wright & A. Miller, Federal Practice and Procedure § 1839, pp. 427, 435, 436 (1972); 3B J. Moore, Federal Practice ¶ 23.1.24 [2], App. p. 23.1–131 (1978).

[17] In this Court, the parties hotly dispute the content of the correct state rule. Compare Brief for Petitioners 36–38 with Brief for Respondents 35–39.

and Investment Advisers Acts. This reading, of course, is at odds with the absolutist position taken by the opinion concurring in the judgment, but it seems to me that a situation could very well exist where state law conflicts with federal policy. The effectuation of that federal policy should not then be foreclosed, as the concurring opinion implies it would be.

MR. JUSTICE STEWART, with whom MR. JUSTICE POWELL joins, concurring in the judgment.

The Investment Company Act of 1940 and the Investment Advisers Act of 1940 are silent on the question whether the disinterested directors of an investment company may terminate a stockholders' derivative suit. The inquiry thus must turn to the relevant state law. I cannot agree with the implications in the Court's opinion, *ante*, at 480, 481–482, 486, that there is any danger that state law will conflict with federal policy.

The business decisions of a corporation are normally entrusted to its board of directors. A decision whether or not a corporation will sue an alleged wrongdoer is no different from any other corporate decision to be made in the collective discretion of the disinterested directors. *E. g., Swanson* v. *Traer*, 354 U. S. 114, 116; *United Copper Securities Co.* v. *Amalgamated Copper Co.*, 244 U. S. 261, 263; *McKee* v. *Rogers*, 18 Del. Ch. 81, 156 A. 191 (1931); *Rice* v. *Wheeling Dollar Savings & Trust Co.*, 130 N. E. 2d 442 (Ohio Ct. Com. Pleas 1954); *Goodwin* v. *Castleton*, 19 Wash. 2d 748, 144 P. 2d 725 (1944).

On remand, the issue will be whether the state law here applicable recognizes this generally accepted principle and thereby empowers the directors to terminate this stockholder suit. Since Congress intended disinterested directors of mutual funds to be "independent watchdogs," *ante*, at 484, I can see no possible conflict between this generally accepted principle of state law and the federal statutes in issue.

FORD MOTOR CO. (CHICAGO STAMPING PLANT) *v.* NATIONAL LABOR RELATIONS BOARD ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 77-1806. Argued February 28, 1979—Decided May 14, 1979

Petitioner provides its employees with in-plant cafeteria and vending machine services. The services are managed by an independent caterer, but petitioner has the right to review and approve the quality, quantity, and prices of the food served. When petitioner notified respondent union, which represents the employees, that the cafeteria and vending machine prices were to be increased, the union requested bargaining over the prices and services. Petitioner refused to bargain, and the union then filed an unfair labor practice charge with the National Labor Relations Board (NLRB), alleging a refusal to bargain contrary to § 8 (a) (5) of the National Labor Relations Act (NLRA). The duty of management and unions to bargain under § 8 (a) (5) is defined by § 8 (d) as the obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and "other terms and conditions of employment." Taking its consistent view that in-plant food prices and services are "other terms and conditions of employment," the NLRB sustained the charge and ordered petitioner to bargain. The Court of Appeals enforced the order.

Held: In-plant cafeteria and vending machine food and beverage prices and services are "terms and conditions of employment" subject to mandatory collective bargaining under §§ 8 (a) (5) and 8 (d) of the NLRA. Pp. 494–503.

(a) Since Congress has assigned to the NLRB the primary task of marking out the scope of the statutory language and duty to bargain, and since the NLRB has special expertise in classifying bargaining subjects as "terms and conditions of employment," its judgment as to what is a mandatory bargaining subject is entitled to considerable deference. Pp. 494–496.

(b) The NLRB's judgment is subject to judicial review, but if its construction of the statute is reasonably defensible, it should not be rejected merely because the courts might prefer another view of the statute. Here, the NLRB's view is not an unreasonable or unprincipled construction of the statute and should be accepted and enforced. Pp. 497–498.

(c) Including within § 8 (d) the prices of in-plant-supplied food and beverages serves the ends of the NLRA by funneling an area of common dispute between employers and employees into collective bargaining. Pp. 498–500.

(d) In-plant food prices and services are an aspect of the relationship between petitioner and its employees, and no third-party interest is directly implicated. Therefore, the standard applied in *Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U. S. 157, as to whether the third-party concern "vitally affects" the "terms and conditions" of the bargaining-unit employees' employment, has no application. Pp. 500–501.

(e) Petitioner's argument that in-plant food prices and services are too trivial to qualify as mandatory bargaining subjects is without merit, especially where both the NLRB and the bargaining-unit employees have taken a contrary view. P. 501.

(f) Problems created by constantly shifting food prices can be anticipated and provided for in the collective-bargaining agreement. To the extent that disputes are likely to be frequent and intense, more, not less, collective bargaining is the remedy. Pp. 501–502.

(g) To require petitioner to bargain over in-plant food-service prices is not futile. Although the prices are set by the third-party caterer, petitioner retains the right to review and control such prices. In any event, an employer can always affect prices by initiating or altering a subsidy to a third-party supplier, such as that provided by petitioner in this case, and will typically have the right to change suppliers in the future. P. 503.

571 F. 2d 993, affirmed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, MARSHALL, POWELL, REHNQUIST, and STEVENS, JJ., joined. POWELL, J., filed a concurring opinion, *post*, p. 503. BLACKMUN, J., filed an opinion concurring in the result, *post*, p. 504.

Theophil C. Kammholz argued the cause for petitioner. With him on the briefs were *Stanley R. Strauss* and *William J. Rooney.*

Norton J. Come argued the cause for respondent National Labor Relations Board. With him on the brief were *Solicitor General McCree, Deputy Solicitor General Wallace,* and *John S. Irving. John A. Fillion* argued the cause for respondent United Automobile Workers Local 588. With him on the

brief were *M. Jay Whitman, Irving M. Friedman,* and *Jerome Schur.**

MR. JUSTICE WHITE delivered the opinion of the Court.

The principal question [1] in this case is whether prices for in-plant cafeteria and vending machine food and beverages are "terms and conditions of employment" subject to mandatory collective bargaining under §§ 8 (a)(5) and 8 (d) of the National Labor Relations Act. 49 Stat. 452, as amended, 29 U. S. C. §§ 158 (a)(5) and 158 (d).[2]

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* *P. Kevin Connelly* filed a brief for the National Automatic Merchandising Assn. as *amicus curiae* urging reversal.

J. Albert Woll, Robert Mayer, and *Laurence Gold* filed a brief for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae* urging affirmance.

[1] The National Labor Relation Board's order at issue here directed petitioner to bargain with respondent Union "with respect to food services and changes in food prices in [petitioner's in-plant] vending machines and cafeteria. . . ." *Ford Motor Co. (Chicago Stamping Plant),* 230 N. L. R. B. 716, 719 (1977), enf'd, 571 F. 2d 993 (CA7 1978). The duty to bargain over nonprice aspects of in-plant food services is thus also at issue here. The Board's order also obligated petitioner to supply respondent Union with the information necessary for bargaining. 230 N. L. R. B., at 719. It seems agreed that if food prices and service are mandatory bargaining subjects, the order to furnish information should stand. See *Detroit Edison Co.* v. *NLRB,* 440 U. S. 301, 303 (1979).

[2] The relevant provisions of the National Labor Relations Act are as follows:

"SEC. 8. (a) It shall be an unfair labor practice for an employer—

. . . . . .

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

. . . . . .

"(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if

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Petitioner, Ford Motor Co., operates an automotive parts stamping plant in Chicago Heights, Ill., employing 3,600 hourly rated production employees. These employees are represented in collective bargaining with Ford by the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, and by its administrative component, Local 588, a respondent here.

For many years, Ford has undertaken to provide in-plant food services to its Chicago Heights employees.[3] These services, which include both cafeterias and vending machines, are managed by an independent caterer, ARA Services, Inc.

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requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . .

. . . . .

"SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . ." As amended, 61 Stat. 140, 142, 143.

As originally enacted, the Wagner Act did not define the subjects of § 8 (a) (5)'s obligation to bargain, although § 9 (a), which was contained in the Wagner Act, made reference to "rates of pay, wages, hours of employment, or other conditions of employment." Section 8 (d) was added by the Taft-Hartley amendments to the Act in 1947, and expressly defined the scope of the duty to bargain as including "wages, hours, and other terms and conditions of employment." The relevant details of this development are discussed *infra*, at 495–496.

[3] It is difficult for employees to eat away from the plant during their shifts. The lunch period is 30 minutes, and the few restaurants in the vicinity are all over a mile away, in an area heavily saturated with industrial plants employing thousands of workers. As a result, very few of the 3,600 workers leave the plant during the lunch period. Two 22-minute rest breaks are also provided during the shifts, but employees are not permitted to leave the plant then.

Some workers bring food to work. No refrigerated storage facilities are provided, however, and spoilage and vermin are a problem, particularly in the summer.

Under its contract with Ford, ARA furnishes the food, management, machines, and personnel in exchange for reimbursement of all direct costs and a 9% surcharge on net receipts.[4] Ford has the right to review and approve the quality, quantity, and price of the food served.

Over the years, Ford and the Union have negotiated about food services. The National Labor Relations Board (Board) found:

> "Since 1967, the local contract has included provisions dealing with vending and cafeteria services. The contracts have covered the staffing of service lines, adequate cafeteria supervision, restocking and repairing vending machines, and menu variety. The 1974 local agreement also states, 'the Company recognized its continuing responsibility for the satisfactory performance of the caterer and for the expeditious handling of complaints concerned with such performance.'" *Ford Motor Co. (Chicago Stamping Plant)*, 230 N. L. R. B. 716 (1977), enf'd, 571 F. 2d 993 (CA7 1978).

Ford, however, has always refused to bargain about the prices of food and beverages served in its in-plant facilities.

On February 6, 1976, Ford notified the Union that cafeteria and vending machine prices would be increased shortly by unspecified amounts. The Union requested bargaining over both price and services and also asked for information relevant to Ford's involvement in food services in order to assist bargaining. These requests were refused by Ford, which took the position that food prices and services are not terms or conditions of employment subject to mandatory bargaining.

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[4] If receipts exceed ARA's cost plus the 9% surcharge, Ford is entitled to the excess. If revenues do not meet the costs of the operation plus the surcharge, the company is obligated to pay ARA up to $52,000 a year. In recent years, deficits have occurred often. In meeting the deficits, Ford has thereby subsidized employee meals and indirectly influenced the price of the food sold.

The Union then filed an unfair labor practice charge with the Board, alleging a refusal to bargain contrary to § 8 (a)(5).[5] The Board sustained the charge, ordering Ford to bargain on both food prices and services and to supply the Union with the relevant information requested. *Ford Motor Co.* (*Chicago Stamping Plant*), *supra.* In doing so, the Board reaffirmed its position, expressed in several prior cases, that prices of in-plant-supplied food and beverages are generally mandatory bargaining subjects, a position that had not been accepted by reviewing courts.[6] The Board also noted that the circumstances of this case made it a particularly strong one for invoking the duty to bargain.[7]

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[5] The Union also began a boycott of food services in which more than half of the employees participated. The boycott ended slightly more than three months later without any reductions in prices.

[6] *Westinghouse Electric Corp.*, 156 N. L. R. B. 1080, 1081, enf'd, 369 F. 2d 891 (CA4 1966), rev'd en banc, 387 F. 2d 542 (1967); *McCall Corp.*, 172 N. L. R. B. 540 (1968), enf. denied, 432 F. 2d 187 (CA4 1970); *Package Machinery Co.*, 191 N. L. R. B. 268 (1971), enf. denied, 457 F. 2d 936 (CA1 1972); *Ladish Co.*, 219 N. L. R. B. 354 (1975), enf. denied, 538 F. 2d 1267 (CA7 1976).

[7] See *Ford Motor Co.* (*Chicago Stamping Plant*), 230 N. L. R. B., at 717–718, n. 11:

"We note that the instant case, on its facts, is in many respects a stronger case than *Ladish* for adhering to our position. Unlike *Ladish*, where the respondent had no input on prices, the Respondent in this case retains influence over cafeteria and vending machine prices by its right to review prices and its leverage of the subsidy agreement. In addition, there also exists the possibility for the Respondent to make a profit on the food service operation. Also, since 1967, the parties in this case have bargained over in-plant food services. No such bargaining history was present in *Ladish*. Moreover, in *Ladish*, the court implied that 'brown-bagging' is a viable alternative to purchasing lunch from the commercial food service. However, in this case, employees have complained about spoilage of food stored in their lockers until lunch, as well as unsanitary conditions in the locker room (wherein the Respondent has found it necessary on occasion to exterminate). Additionally, the employees have apparently been so concerned with the food pricing that over half of them

The case came before the Court of Appeals for the Seventh Circuit on Ford's petition for review and the Board's cross-petition for enforcement. That court, while adhering to its prior decision in *NLRB* v. *Ladish Co.*, 538 F. 2d 1267 (1976), which had refused enforcement of a Board order to bargain about in-plant food prices, enforced the Board's order here because, "under the facts and circumstances of this case, in-plant cafeteria and vending machine food prices and services materially and significantly affect and have an impact upon terms and conditions of employment and therefore are mandatory subjects of bargaining." 571 F. 2d, at 1000. The court was particularly influenced by the lack of reasonable eating alternatives for employees, declaring that "[t]he food one must pay for and eat as a captive customer within the employer's plant can be viewed as a physical dimension of one's working environment." *Ibid.*

Because of the importance of the issue and the apparent conflict between the decision below and decisions of other Circuits, see n. 6, *supra*, we granted certiorari. 439 U. S. 891 (1978). We affirm the judgment of the Court of Appeals for the Seventh Circuit enforcing the Board's order to bargain.

II

The Board has consistently held that in-plant food prices are among those terms and conditions of employment defined

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participated in a boycott of the Respondent's food service operations. There was no such labor strife involved in *Ladish*. Lastly, in *Ladish* the employees were represented by seven unions. The court therein projected that each time the food prices were raised 'the Company could be compelled to engage in seven rounds of negotiations.' 538 F. 2d at 1272. This fact, the court declared, 'provides a good example of a situation in which bargaining could be both disruptive of stable relations and economically wasteful.' *Id.* In the instant case, however, the employees are represented by a single union. While we adhere to the view that the number of unions representing employees at a single plant is not a factor in resolving this issue, we nevertheless note that, even in the court's view, there is no potential for conflicting union demands in this case."

in § 8 (d) and about which the employer and union must bargain under §§ 8 (a)(5) and 8 (b)(3). See n. 6, *supra*. Because it is evident that Congress assigned to the Board the primary task of construing these provisions in the course of adjudicating charges of unfair refusals to bargain and because the "classification of bargaining subjects as 'terms or conditions of employment' is a matter concerning which the Board has special expertise," *Meat Cutters* v. *Jewel Tea Co.*, 381 U. S. 676, 685–686 (1965), its judgment as to what is a mandatory bargaining subject is entitled to considerable deference.

Section 8 (a)(5) of the National Labor Relations Act, as originally enacted, declared it an unfair practice for the employer to refuse to bargain collectively. Act of July 5, 1935, 49 Stat. 453. Although the Act did not purport to define the subjects of collective bargaining, § 9 (a) made the union selected by a majority in a bargaining unit the exclusive representative of the employees for bargaining about "rates of pay, wages, hours of employment, or other conditions of employment." Under these provisions, the Board was left with the task of identifying on a case-by-case basis those "other conditions of employment" over which management was required to bargain.

In 1947, the Taft-Hartley Act amended the National Labor Relations Act to obligate unions as well as management to bargain; and § 8 (d) explicitly defined the duty of both sides to bargain as the obligation to "meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . ." 61 Stat. 142, now codified at 29 U. S. C. § 158 (d). The original House bill had contained a specific listing of the issues subject to mandatory bargaining, H. R. 3020, 80th Cong., 1st Sess., § 2 (11) (1947); H. R. Rep. No. 245, 80th Cong., 1st Sess., 22–23, 49 (1947), but this attempt to "strait-jacke[t]" and to "limit narrowly the subject matters appropriate for collective bargaining,"

id., at 71 (minority report);[8] see also 93 Cong. Rec. 3446–3447 (1947) (remarks of Rep. Klein), was rejected in conference in favor of the more general language adopted by the Senate and now appearing in § 8 (d). S. 1126, 80th Cong., 1st Sess., § 8 (d) (1947); see 93 Cong. Rec. 6444 (1947) (summary report of Sen. Taft); cf. H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 8, 34 (1947). It is thus evident that Congress made a conscious decision to continue its delegation to the Board of the primary responsibility of marking out the scope of the statutory language and of the statutory duty to bargain. This case, therefore, is one of those situations in which we should "recognize without hesitation the primary function and responsibility of the Board . . . ," *NLRB* v. *Insurance Agents*, 361 U. S. 477, 499 (1960), which is that "of applying the general provisions of the Act to the complexities of industrial life . . . and of '[appraising] carefully the interests of both sides of any labor-management controversy in the diverse circumstances of particular cases' from its special understanding of 'the actualities of industrial relations.'" *NLRB* v. *Erie Resistor Corp.*, 373 U. S. 221, 236 (1963), quoting *NLRB* v. *Steelworkers*, 357 U. S. 357, 362–363 (1958).[9]

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[8] The Report declared:

"The appropriate scope of collective bargaining cannot be determined by a formula; it will inevitably depend upon the traditions of an industry, the social and political climate at any given time, the needs of employers and employees, and many related factors. What are proper subject matters for collective bargaining should be left in the first instance to employers and trade unions, and in the second place, to any administrative agency skilled in the field and competent to devote the necessary time to a study of industrial practices and traditions in each industry or area of the country, subject to review by the courts. It cannot and should not be strait-jacketed by legislative enactment." H. R. Rep. No. 245, 80th Cong., 1st Sess., 71 (1947) (minority report).

[9] See also *Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U. S. 157, 178 (1971) ("Section 8 (d) of the Act, of course, does not immutably fix a list of subjects for mandatory bargaining"); *East Bay Union of Machinists* v. *NLRB*, 116 U. S. App. D. C. 198, 201, 322 F. 2d

Of course, the judgment of the Board is subject to judicial review; but if its construction of the statute is reasonably defensible, it should not be rejected merely because the courts might prefer another view of the statute. *NLRB* v. *Iron Workers,* 434 U. S. 335, 350 (1978). In the past we have refused enforcement of Board orders where they had "no reasonable basis in law," either because the proper legal standard was not applied or because the Board applied the correct standard but failed to give the plain language of the standard its ordinary meaning. *Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.,* 404 U. S. 157, 166 (1971). We have also parted company with the Board's interpretation where it was "fundamentally inconsistent with the structure of the Act" and an attempt to usurp "major policy decisions properly made by Congress." *American Ship Building Co.* v. *NLRB,* 380 U. S. 300, 318 (1965). Similarly, in *NLRB* v. *Insurance Agents, supra,* at 499, we could not accept the Board's application of the Act where we were convinced that the Board was moving "into a new area of regulation which Congress had not committed to it."

The Board is vulnerable on none of these grounds in this case. Construing and applying the duty to bargain and the language of § 8 (d), "other terms and conditions of employment," are tasks lying at the heart of the Board's function. With all due respect to the Courts of Appeals that have held otherwise, we conclude that the Board's consistent view that in-plant food prices and services are mandatory bargaining subjects is not an unreasonable or unprincipled construction of the statute and that it should be accepted and enforced.

411, 414 (1963) (Burger, J.) ("The use of this language was a reflection of the congressional awareness that the act covered a wide variety of industrial and commercial activity and a recognition that collective bargaining must be kept flexible without precise delineation of what subjects were covered so that the Act could be administered to meet changing conditions"), aff'd *sub nom. Fibreboard Paper Products Corp.* v. *NLRB,* 379 U. S. 203 (1964).

It is not suggested by petitioner that an employee should work a full 8-hour shift without stopping to eat. It reasonably follows that the availability of food during working hours and the conditions under which it is to be consumed are matters of deep concern to workers, and one need not strain to consider them to be among those "conditions" of employment that should be subject to the mutual duty to bargain. By the same token, where the employer has chosen, apparently in his own interest, to make available a system of in-plant feeding facilities for his employees, the prices at which food is offered and other aspects of this service may reasonably be considered among those subjects about which management and union must bargain.[10] The terms and conditions under which food is available on the job are plainly germane to the "working environment," *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U. S. 203, 222 (1964) (STEWART, J., concurring). Furthermore, the company is not in the business of selling food to its employees, and the establishment of in-plant food prices is not among those "managerial decisions, which lie at the core of entrepreneurial control." *Id.*, at 223 (STEWART, J., concurring). The Board is in no sense attempting to permit the Union to usurp managerial decisionmaking; nor is it seeking to regulate an area from which Congress intended to exclude it.

Including within § 8 (d) the prices of in-plant-supplied food and beverages would also serve the ends of the National Labor Relations Act. "The object of this Act was not to allow governmental regulation of the terms and conditions of employment, but rather to insure that employers and their employees could work together to establish mutually satisfactory conditions. The basic theme of the Act was that through collective bargaining the passions, arguments, and struggles of prior years would be channeled into constructive,

[10] We should not be understood as holding that whether in-plant food services are to be provided where such services do not already exist is a mandatory bargaining subject. That issue is not involved here.

open discussions leading, it was hoped, to mutual agreement." *H. K. Porter Co.* v. *NLRB*, 397 U. S. 99, 103 (1970). As illustrated by the facts of this case, substantial disputes can arise over the pricing of in-plant-supplied food and beverages. National labor policy contemplates that areas of common dispute between employers and employees be funneled into collective bargaining. The assumption is that this is preferable to allowing recurring disputes to fester outside the negotiation process until strikes or other forms of economic warfare occur.

The trend of industrial practice supports this conclusion. In response to increasing employee concern over the issue, many contracts are now being negotiated that contain provisions concerning in-plant food services.[11] In this case, as

[11] See, *e. g.*, 2 Bureau of National Affairs, Collective Bargaining (Negotiation and Contracts) 95:421–95:424 (1976). See also the following arbitration decisions construing collective-bargaining agreements to cover the cost of employer-supplied food as a condition of employment: *Universal Form Clamp Co.*, 68 Lab. Arb. 1223 (Miller, 1977) (cost of coffee); *Hilton Hotels Corp.*, 42 Lab. Arb. 1267, 1270–1272 (Hanlon, 1964) (cost and type of meals); *Greater Los Angeles Zoo Assn.*, 60 Lab. Arb. 838 (Christopher, 1973) (employer may not discontinue practice of providing free meals to zoo food venders when contract provided that there would be no reduction of employee benefits); *Alpena General Hospital*, 50 Lab. Arb. 48 (Jones, 1967), and *Lutheran Medical Center*, 44 Lab. Arb. 107 (Wolf, 1964) (free meals are working condition).

A survey conducted by the Bureau of National Affairs' Personnel Policies Forum found that 54% of the responding companies provided food services for employees using a lunchroom with vending machines; 43% of the companies provided cafeterias; and 15% provided vending machines with snackbar service. BNA, Labor Policy and Practice Series (Personnel Management) 245:201–245:204 (1976). The National Industrial Conference Board in 1964 reported that 47% of the manufacturing companies that responded to a survey provided cafeteria services, and 55% of the companies subsidized the operation. Only 8% of the companies reported that they were trying to operate the cafeterias at a profit. NICB, Personnel Practices in Factory and Office: Manufacturing, Personnel Policy Study No. 194, pp. 76–77 (1964). Cf. Fisher, Operating Your Firm's Dining Area—Profitably, Administrative Management, Oct. 1966, pp. 66–

already noted, local agreements between Ford and the Union have contained detailed provisions about nonprice aspects of in-plant food services for several years. Although not conclusive, current industrial practice is highly relevant in construing the phrase "terms and conditions of employment." [12]

III

Ford nevertheless argues against classifying food prices and services as mandatory bargaining subjects because they do not "vitally affect" the terms and conditions of employment within

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67; Scheer, The Company Cafeteria, 45 Personnel J. 85–86 (1966); Feeding the Big Captive Customers, Business Week, Oct. 27, 1975, pp. 46–54.

Although the decision below by the Seventh Circuit was the first to uphold the Board's order to bargain about the prices of in-plant-supplied food services, other aspects of food services have been found to be covered by § 8 (d). These include improvement in lunchroom equipment and supplies, *Preston Products Co.*, 158 N. L. R. B. 322 (1966), aff'd in relevant part, 129 U. S. App. D. C. 196, 392 F. 2d 801 (1967), cert. denied, 392 U. S. 906 (1968); coffeebreak scheduling and service of free coffee, *Missourian Pub. Co.*, 216 N. L. R. B. 175, 180 (1975); *D & C Textile Corp.*, 189 N. L. R. B. 769, 771, 783 (1971); *Fleming Mfg. Co.*, 119 N. L. R. B. 452, 455 (1957); free meal policy, *O'Land, Inc., d/b/a Ramada Inn South*, 206 N. L. R. B. 210, 214–215 (1973); cancellation of catering truck service, *Bralco Metals, Inc.*, 214 N. L. R. B. 143, 146–150 (1974); meal areas, *Hasty Print, Inc., d/b/a Walker Color Graphics*, 227 N. L. R. B. 455, 461 (1976); and cleanup of lunchroom areas by employees, *Cosmo Graphics, Inc.*, 217 N. L. R. B. 1061, 1066 (1975).

And, where no in-plant facilities exist, employers are still obligated to bargain about meal hours and coffee breaks. See, *e. g.*, *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U. S., at 222 (STEWART, J., concurring); *Meat Cutters* v. *Jewel Tea Co.*, 381 U. S. 676, 691 (1965).

[12] "While not determinative, it is appropriate to look to industrial bargaining practices in appraising the propriety of including a particular subject within the scope of mandatory bargaining. *Labor Board* v. *American Nat. Ins. Co.*, 343 U. S. 395, 408. Industrial experience is not only reflective of the interests of labor and management in the subject matter but is also indicative of the amenability of such subjects to the collective bargaining process." *Fibreboard Paper Products Corp.* v. *NLRB*, *supra*, at 211.

the meaning of the standard assertedly established by *Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U. S., at 176, and because they are trivial matters over which neither party should be required to bargain.

There is no merit to either of these aguments. First, Ford has misconstrued *Pittsburgh Plate Glass*. That case made it clear that while § 8 (d) normally reaches "only issues that settle an aspect of the relationship between the employer and employees[,] matters involving individuals outside the employment relationship . . . are not wholly excluded." 404 U. S., at 178. In such instances, as in *Teamsters* v. *Oliver*, 358 U. S. 283 (1959), and *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U. S. 203 (1964), the test is not whether the "third-party concern is antagonistic to or compatible with the interests of bargaining-unit employees, but whether it vitally affects the 'terms and conditions' of their employment." 404 U. S., at 179. Here, however, the matter of in-plant food prices and services is an aspect of the relationship between Ford and its own employees. No third-party interest is directly implicated, and the standard of *Pittsburgh Plate Glass* has no application.

As for the argument that in-plant food prices and service are too trivial to qualify as mandatory subjects, the Board has a contrary view, and we have no basis for rejecting it. It is also clear that the bargaining-unit employees in this case considered the matter far from trivial since they pressed an unsuccessful boycott to secure a voice in setting food prices. They evidently felt, and common sense also tells us, that even minor increases in the cost of meals can amount to a substantial sum of money over time. In any event, we accept the Board's view that in-plant food prices and service are conditions of employment and are subject to the duty to bargain.

Ford also argues that the Board's position will result in unnecessary disruption because any small change in price or service will trigger the obligation to bargain. The problem, it

is said, will be particularly acute in situations where several unions are involved,[13] possibly requiring endless rounds of negotiations over issues as minor as the price of a cup of coffee or a soft drink.

These concerns have been thought exaggerated by the Board. Its position in this case, as in all past cases involving the same issue, is that it is sufficient compliance with the statutory mandate if management honors a specific union request for bargaining about changes that have been made or are to be made. *Ford Motor Co. (Chicago Stamping Plant)*, 230 N. L. R. B., at 718; *Westinghouse Electric Corp.*, 156 N. L. R. B. 1080, 1081, enf'd, 369 F. 2d 891 (CA4 1966), rev'd en banc, 387 F. 2d 542 (1967). The Board apparently assumes that, as a practical matter, requests to bargain will not be lightly made. Moreover, problems created by constantly shifting food prices can be anticipated and provided for in the collective-bargaining agreement. Furthermore, if it is true that disputes over food prices are likely to be frequent and intense, it follows that more, not less, collective bargaining is the remedy. This is the assumption of national labor policy, and it is soundly supported by both reason and experience.[14]

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[13] This factor is essentially irrelevant to the determination in this case. The definition of a mandatory collective-bargaining subject does not depend on the number of unions within the bargaining unit. *Westinghouse Electric Corp.*, 156 N. L. R. B., at 1089; *McCall Corp.*, 172 N. L. R. B., at 547.

[14] See, *e. g.*, *Fibreboard Paper Products Corp.* v. *NLRB*, *supra*, at 211 ("The Act was framed with an awareness that refusals to confer and negotiate had been one of the most prolific causes of industrial strife"); *Westinghouse Electric Corp.* v. *NLRB*, 369 F. 2d, at 895 ("The underlying philosophy of the Labor Act is that discussion of issues between labor and management serves as a valuable prophylactic by removing grievances, real or fancied, and tends to improve and stabilize labor relations"); see also Cox, The Duty to Bargain in Good Faith, 71 Harv. L. Rev. 1401, 1412 (1958): "Participation in debate often produces changes in a seemingly fixed position either because new facts are brought to light or because the strengths and weaknesses of the several arguments become apparent.

Finally, Ford asserts that to require it to engage in bargaining over in-plant food service prices would be futile because those prices are set by a third-party supplier, ARA. It is true that ARA sets vending machine and cafeteria prices, but under Ford's contract with ARA, Ford retains the right to review and control food services and prices. In any event, an employer can always affect prices by initiating or altering a subsidy to the third-party supplier such as that provided by Ford in this case, and will typically have the right to change suppliers at some point in the future. To this extent the employer holds future, if not present, leverage over in-plant food services and prices.[15]

We affirm, therefore, the Court of Appeals' judgment upholding the Board's determination in this case that in-plant food services and prices are "terms and conditions of employment" subject to mandatory bargaining under §§ 8 (a)(5) and 8 (d) of the National Labor Relations Act.

So ordered.

MR. JUSTICE POWELL, concurring.

The Court today holds that prices for in-plant cafeteria and vending machine food and beverages are "terms and conditions of employment" subject to mandatory collective bargaining under the National Labor Relations Act. Although this view of the Act has been taken consistently by the National Labor Relations Board, none of the courts of appeals

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Sometimes the parties hit upon some novel compromise of an issue which has been thrashed over and over. Much is gained even by giving each side a better picture of the strength of the other's convictions. The cost is so slight that the potential gains easily justify legal compulsion to engage in the discussion."

[15] In-plant food services provided by third parties are not unlike other kinds of benefits, such as health insurance, implicating outside suppliers. In each case, the employer contracts with a third party to provide a benefit to employees and, during the term of the contract, is unable to change the price at which that benefit is available to the employee except by employee subsidies.

has agreed with the absolute approach of the Board. Rather, these courts in general have taken the position that whether bargaining with respect to in-plant food service was required depends upon the facts and circumstances of each case. Although the Court of Appeals for the Seventh Circuit enforced the Board's order in this case, it did so on a "facts and circumstances" basis.

I had thought that the case-by-case approach was more likely to be fair to both employer and union than is the mandatory bargaining rule adopted today. The conditions and circumstances under which in-plant food service is provided can and do vary widely among the thousands of enterprises subject to the Act. Yet, curiously enough, neither petitioner nor respondent union in this case supports the "facts and circumstances" approach of the Court of Appeals. On balance, I suppose there is merit in having a "bright line" with respect to this issue. This does put the parties to all collective bargaining on prior notice, with a reasonable expectation that the issue usually will be resolved in advance at the bargaining table. I am, therefore, persuaded to join the Court's opinion.

MR. JUSTICE BLACKMUN, concurring in the result.

I am in accord with much—indeed with most—of what the Court pronounces in its opinion, and I join its judgment.

My concern is with the last two sentences of the penultimate paragraph of the Court's opinion. *Ante*, at 503. The Court there says that "[i]n any event" an employer, by *initiating* or altering a subsidy to a third-party supplier, "can always affect prices" and "will typically have the right to change suppliers at some point in the future." Thus, to this extent, "the employer holds future, if not present, leverage over in-plant food services and prices." To me, this language seems to say that Ford's control over prices under the facts of this case is really irrelevant to the "mandatory subject" inquiry, and seems to imply that an employer must bargain about prices even if he has no actual control over them at all.

Any employer, of course, could achieve some measure of future control over prices, by initiating a subsidy or by changing suppliers. That future possibility, however, should not be enough.

If the employer has no control over prices, bargaining about them is futile. If the employer rents space in a corner of the plant to a restaurateur, and thereafter maintains a "hands off" attitude and has no input into the food operation, it is difficult for me to see how bargaining about food prices makes any sense. The employer has no more control over prices by virtue of its landlord status than it has over prices charged at the hamburger shop across the street. If the employer really has no control over prices, moreover, it is not obvious that the prices charged "settle an aspect of the relationship between the employer and employees," *Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U. S. 157, 178 (1971), a precondition for mandatory bargaining status. The pertinent relationship is then between the restaurateur and the employees. If the employer has no control over prices and services whatsoever, and if he nevertheless is required to bargain about them because in the future he might be able to exercise some control over them, the employer's "managerial decision making" may well be usurped, and we are close to the basic concern of the concurrence in *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U. S. 203, 222 (1964).

I think it is unwise to go out of our way to hold—if the Court does so here—that an employer with no present actual influence or control over food prices should be forced to bargain about them because of the mere possibility that he might have "future leverage." That situation is not presented in this case, and I see no need for the Court to decide it. For now, I prefer only a general rule that food prices are mandatorily bargainable so long as the employer, as here, has some measure of actual influence over the prices charged.

I thus join the Court in the result it reaches in this case. I would reserve other situations for another day.

UNITED STATES *v.* 564.54 ACRES OF LAND, MORE OR LESS, SITUATED IN MONROE AND PIKE COUNTIES, PENNSYLVANIA, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 78–488. Argued March 27, 1979—Decided May 14, 1979

The Government initiated condemnation proceedings to acquire land on which respondent, a private nonprofit organization, operated summer camps. Before trial, respondent rejected the Government's offer to pay the fair market value of the property, demanding instead the cost of developing functionally equivalent substitute facilities at a new site. The District Court held that the "substitute facilities" measure of compensation was available only to governmental condemnees, and that respondent therefore was entitled only to the fair market value of its property. On interlocutory appeal, the Court of Appeals reversed and remanded, holding that private nonprofit owners can obtain substitute-facilities compensation if there is no "ready market" for the condemned property and if the facilities are "reasonably necessary to public welfare." At trial, the jury found that respondent was not entitled to such compensation and awarded the fair market value of the property. The Court of Appeals again reversed, concluding that a new trial was required because of erroneous jury instructions on the "reasonable necessity" requirement.

Held: Allowing respondent the fair market value of its property, rather than the cost of substitute facilities, is consistent with the principles of fairness underlying the Just Compensation Clause of the Fifth Amendment. Pp. 510–517.

(a) In giving content to the just-compensation requirement of the Fifth Amendment, this Court has sought to put the owner of condemned property "in as good a position pecuniarily as if his property had not been taken," *Olson* v. *United States*, 292 U. S. 246, 255. But this principle of indemnity has not been given its full and literal force. Because of serious practical difficulties in assessing the worth an individual places on particular property, the Court has resorted to the concept of fair market value—what a willing buyer would pay in cash to a willing seller at the time of the taking—even though this measure does not encompass all values an owner may derive from his property. However, when market value is too difficult to ascertain or when such

an award would depart too far from the indemnity principle, other standards of compensation are appropriate. *United States* v. *Commodities Trading Corp.*, 339 U. S. 121, 123. Pp. 510–513.

(b) Here, there are no circumstances that require suspension of the normal rules for determining just compensation. Respondent's property had a readily discernible market value. And an award reflecting that figure would not be unjust simply because it might preclude continuation of respondent's use. This Court has previously held that nontransferable values arising from the owner's unique need for the property are not compensable. That respondent is a nonprofit organization does not require a different result. Nor is it relevant whether respondent's camps were reasonably necessary to the public welfare, since respondent is under no legal or factual obligation to replace the camps, regardless of their social worth. And that the camps may have benefited the community does not warrant compensating respondent differently from other private owners, for the principle of indemnity focuses exclusively on the owner's loss. To the extent that denial of an award for the use value of respondent's property departs from the indemnity principle, it is justified by the necessity for a workable measure of valuation. Pp. 513–517.

576 F. 2d 983, reversed.

MARSHALL, J., delivered the opinion of the Court, in which all other Members joined except POWELL, J., who took no part in the consideration or decision of the case. WHITE, J., filed a concurring opinion, *post*, p. 517.

Deputy Solicitor General Barnett argued the cause for the United States. With him on the briefs were *Solicitor General McCree, Assistant Attorney General Moorman, Deputy Assistant Attorney General Liotta, Sara Sun Beale, Peter R. Steenland, Jr., Raymond N. Zagone,* and *John J. Zimmerman.*

H. Ober Hess argued the cause for respondent Southeastern Pennsylvania Synod of the Lutheran Church in America. With him on the brief was *Arthur Makadon.*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

At issue in this case is the proper measure of compensation when the Government condemns property owned by a private nonprofit organization and operated for a public purpose. In

particular, we must decide whether the Just Compensation Clause of the Fifth Amendment [1] requires payment of replacement cost rather than fair market value of the property taken.

I

Respondent, the Southeastern Pennsylvania Synod of the Lutheran Church in America, operates three nonprofit summer camps along the Delaware River. In June 1970, the United States initiated a condemnation proceeding to acquire respondent's land for a public recreational project. Before trial, the Government offered to pay respondent $485,400 as the fair market value of its property. Respondent rejected the offer and demanded approximately $5.8 million, the asserted cost of developing functionally equivalent substitute facilities at a new site. This substantial award was necessary, respondent contended, because the new facilities would be subject to financially burdensome regulations from which existing facilities were exempt under grandfather provisions.

In a pretrial ruling, the District Court held that the "substitute facilities," or replacement cost, measure of compensation was available only to governmental condemnees, and that respondent therefore was entitled only to the fair market value of its property. App. 38–48. On interlocutory appeal, the Court of Appeals for the Third Circuit reversed. 506 F. 2d 796 (1974). Relying on other appellate decisions,[2] the Court of Appeals determined that in condemnations of property belonging to States or their subdivisions, the Fifth Amendment requires an award of replacement cost "so that

[1] The Fifth Amendment of the Constitution provides in pertinent part: "nor shall private property be taken for public use, without just compensation."

[2] See, *e. g.*, *United States* v. *Certain Property in Borough of Manhattan*, 403 F. 2d 800 (CA2 1968); *United States* v. *Board of Education of Mineral County*, 253 F. 2d 760 (CA4 1958); *Washington* v. *United States*, 214 F. 2d 33 (CA9), cert. denied, 348 U. S. 862 (1954); *Fort Worth* v. *United States*, 188 F. 2d 217 (CA5 1951).

the functions carried out by or on behalf of members of the community may be continued." *Id.*, at 799–800.[3] Since the Fifth Amendment refers expressly to private but not to public property, the court reasoned that the Framers could not have "intended to impose a greater obligation of indemnification" toward public entities than toward private owners. *Id.*, at 801. Accordingly, the Court of Appeals applied standards governing condemnations of publicly owned property, and held that substitute-facilities compensation was available to private nonprofit owners if there was no "ready market" for the condemned property and if the facilities were "reasonably necessary to public welfare." *Id.*, at 800. The case was remanded to the District Court for consideration of whether respondent's property met this test.

After a 10-day trial, the District Court instructed the jury regarding the prerequisites of a substitute-facilities award. Specifically, the court charged that there was no "ready market" for respondent's facilities if "the fair market value of the condemned property [was] substantially less than the cost of constructing functionally equivalent substitute facilities." See 576 F. 2d 983, 992 n. 9 (1978). The District Court further instructed that the property was "reasonably necessary to public welfare" if it "fulfill[ed] a community need or purpose." See *id.*, at 995 n. 16. The jury found that respondent was not entitled to substitute-facilities compensation, and after considering additional evidence, awarded $740,000 as the fair market value of the property.

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[3] This Court has not passed on the propriety of substitute-facilities compensation for public condemnees. Although the Court of Appeals cited *Brown* v. *United States*, 263 U. S. 78 (1923), as "the genesis of the substitution of facilities method of measuring fair compensation," 506 F. 2d, at 802, that case addressed the scope of the Government's condemnation power, not the compensation requisite under the Fifth Amendment. In light of our disposition of this case, we express no opinion on the appropriate measure of compensation for publicly owned property.

A different panel of the Court of Appeals reversed. *Id.*, at 996. Although the court found that the jury instructions on the ready-market issue were not fundamentally in error,[4] it disagreed with the District Court's interpretation of the reasonable-necessity requirement. Under the Court of Appeals' theory, this test was met if the facility "provide[d] a benefit to the community that [would] not be as fully provided after the facility [was] taken." *Id.*, at 995. Because the jury instruction had been framed in terms of necessity rather than community benefit, the court concluded that a new trial was required. One judge, concurring, agreed that the trial court's charge had not been consistent with the Court of Appeals' interlocutory decision, but argued that the prior opinion, although controlling, was incorrect. *Id.*, at 996–1000. The third member of the panel dissented on the ground that the District Court had adhered to the principles previously enunciated in the interlocutory opinion. *Id.*, at 1001–1010.

We granted certiorari, 439 U. S. 978 (1978), and now reverse.

II

A

In giving content to the just compensation requirement of the Fifth Amendment, this Court has sought to put the owner of condemned property "in as good a position pecuniarily as if his property had not been taken." *Olson* v. *United States*, 292 U. S. 246, 255 (1934).[5] However, this principle of in-

[4] The Court of Appeals, however, did seek to clarify the ready-market criterion, holding that "regardless of whether the Synod could have sold the camps, and regardless of whether the camps had fair market value, this condition . . . is met if the Synod could not have replaced the camps' facilities in the marketplace for a cost roughly equivalent to the fair market value of the camps." 576 F. 2d, at 991.

[5] Accord, *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 326 (1893); *United States* v. *Miller*, 317 U. S. 369, 373 (1943); *United States* v. *Virginia Electric & Power Co.*, 365 U. S. 624, 633 (1961); *United*

demnity has not been given its full and literal force. Because of serious practical difficulties in assessing the worth an individual places on particular property at a given time, we have recognized the need for a relatively objective working rule. See *United States* v. *Miller*, 317 U. S. 369, 374 (1943); *United States* v. *Cors*, 337 U. S. 325, 332 (1949). The Court therefore has employed the concept of fair market value to determine the condemnee's loss. Under this standard, the owner is entitled to receive "what a willing buyer would pay in cash to a willing seller" at the time of the taking. *United States* v. *Miller, supra*, at 374; accord, *City of New York* v. *Sage*, 239 U. S. 57, 61 (1915); *United States* v. *Virginia Electric & Power Co.*, 365 U. S. 624, 633 (1961); *Almota Farmers Elevator & Warehouse Co.* v. *United States*, 409 U. S. 470, 474 (1973).

Although the market-value standard is a useful and generally sufficient tool for ascertaining the compensation required to make the owner whole,[6] the Court has acknowledged that such an award does not necessarily compensate for all values an owner may derive from his property. Thus, we have held that fair market value does not include the special value of property to the owner arising from its adaptability to his particular use. *United States* v. *Miller, supra*, at 374–375; *United States* v. *Cors, supra*, at 332. As Mr. Justice Frankfurter wrote for the Court in *Kimball Laundry Co.* v. *United States*, 338 U. S. 1, 5 (1949):

> "The value of property springs from subjective needs and attitudes; its value to the owner may therefore differ widely from its value to the taker. Most things, how-

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States v. *Reynolds*, 397 U. S. 14, 16 (1970); *Almota Farmers Elevator & Warehouse Co.* v. *United States*, 409 U. S. 470, 473–474 (1973).

[6] The standard is most accurate with respect to readily salable articles such as merchandise, because the value of such property is ordinarily what it can command in the marketplace. See *United States* v. *Toronto, Hamilton & Buffalo Nav. Co.*, 338 U. S. 396, 404 (1949).

> ever, have a general demand which gives them a value transferable from one owner to another. As opposed to such personal and variant standards as value to the particular owner whose property has been taken, this transferable value has an external validity which makes it a fair measure of public obligation to compensate the loss incurred by an owner as a result of the taking of his property for public use. In view, however, of the liability of all property to condemnation for the common good, loss to the owner of nontransferable values deriving from his unique need for property or idiosyncratic attachment to it, like loss due to an exercise of the police power, is properly treated as part of the burden of common citizenship."

See 1 L. Orgel, Valuation Under the Law of Eminent Domain § 14 (2d ed. 1953). In short, the concept of fair market value has been chosen to strike a fair "balance between the public's need and the claimant's loss" upon condemnation of property for a public purpose. *United States* v. *Toronto, Hamilton & Buffalo Nav. Co.*, 338 U. S. 396, 402 (1949); see also *United States ex rel. TVA* v. *Powelson*, 319 U. S. 266, 280 (1943).

But while the indemnity principle must yield to some extent before the need for a practical general rule, this Court has refused to designate market value as the sole measure of just compensation. For there are situations where this standard is inappropriate. As we held in *United States* v. *Commodities Trading Corp.*, 339 U. S. 121, 123 (1950):

> "[W]hen market value has been too difficult to find, or when its application would result in manifest injustice to owner or public, courts have fashioned and applied other standards. . . . Whatever the circumstances under which such constitutional questions arise, the dominant consideration always remains the same: What compensation is 'just' both to an owner whose property is taken and to the public that must pay the bill?"

See also *United States* v. *Cors, supra,* at 332; *United States* v. *Toronto, Hamilton & Buffalo Nav. Co., supra,* at 402; *United States* v. *Miller, supra,* at 374.[7] Hence, we must determine whether application of the fair-market-value standard here would be impracticable or whether an award of market value would diverge so substantially from the indemnity principle as to violate the Fifth Amendment.

B

The instances in which market value is too difficult to ascertain generally involve property of a type so infrequently traded that we cannot predict whether the prices previously paid, assuming there have been prior sales, would be repeated in a sale of the condemned property. See *United States* v. *Toronto, Hamilton & Buffalo Nav. Co., supra,* at 402; cf. *United States* v. *Miller, supra,* at 374–375. This might be the case, for example, with respect to public facilities such as roads or sewers. But respondent's property does not fall in this category.[8] There was a market for camps, albeit not an extremely active one. The Government's expert witness presented evidence concerning 11 recent sales of comparable facilities in the vicinity, and estimated that respondent's

[7] To be sure, the issue in these cases was whether the asserted market value exceeded the compensation necessary to indemnify the condemnees. But "the principle, as stated in the *Commodities Trading* opinion, must work both ways." *In re Valuation Proceedings,* 445 F. Supp. 994, 1031 (Sp. Ct. R. R. R. A.) (Friendly, J.), appeals dism'd without prejudice *sub nom. Blanchette* v. *U. S. Railway Assn.,* 434 U. S. 993 (1977).

[8] The jury's determination that the camps had a market value of $740,000 does not resolve the issue whether market value was in fact ascertainable. That issue depends on whether evidence could feasibly be obtained to present a jury question on the appropriate market value. Such an inquiry is related to the one an appellate court would undertake in reviewing the sufficiency of the evidence to support a jury's market-value determination. However, in the latter circumstance, the issue would be whether evidence was *in fact presented* from which the jury could rationally arrive at its result.

camps could have been sold within six months to a year after they were offered for sale. Tr. 256–258, 263–264, 269–276. Indeed, respondent's own expert testified that he had prepared an appraisal of the camps' fair market value as of the date of the taking. App. 143–144. And the Court of Appeals implicitly acknowledged that the market value of nonprofit property is ordinarily ascertainable since application of the court's "ready market" criterion requires assessment of fair market value. See n. 4, *supra*. Thus, it seems clear that respondent's property had a readily discernible market value. The only remaining inquiry is whether such an award would impermissibly deviate from the indemnity principle.

Emphasizing that the primary value of the condemned property lies in the use to which it is put, respondent argues that compensating only for market value would be unjust in the present context. Because new facilities would bear financial burdens imposed by regulations to which the existing camps were not subject, an award of market value would preclude continuation of respondent's use. Brief for Respondent 5. Respondent therefore concludes that such a recovery would be insufficient to indemnify for its loss. See 506 F. 2d, at 798.

However, it is not at all unusual that property uniquely adapted to the owner's use has a market value on condemnation which falls far short of enabling the owner to preserve that use. Such a situation may often arise, for example, where a family home has been built to the owner's tastes, but is old and deteriorated, or where property, like respondent's camps, is exempt from regulations applicable to new facilities. Cf. 1 L. Orgel, *supra*, § 37, pp. 172–173. Yet the Court has previously determined that nontransferable values arising from the owner's unique need for the property are not compensable, and has found that this divergence from full indemnification does not violate the Fifth Amendment. See *supra*, at 511–512.

We are unable to discern why a different result should obtain here. That respondent is a nonprofit organization may

provide some basis for distinguishing it from business enterprises, since the uses to which commercial property is put can often be valued in terms of the capitalized earnings produced. See 506 F. 2d, at 799; 1 L. Orgel, *supra*, at § 157. Cf. *United States* v. *Toronto, Hamilton & Buffalo Nav. Co.*, 338 U. S., at 403. But there is no reason to treat respondent differently from the many private homeowners and other noncommercial property owners who neither derive earnings from their property nor hold it for investment purposes. Unless the Just Compensation Clause mandates a Government subsidy for nonprofit organizations, a proposition we find patently implausible, respondent's nonprofit status does not require us to reject application of the fair-market-value standard.

Nor is it relevant in this case whether respondent's camps were reasonably necessary to the public welfare. In condemnations of property owned by public entities, lower courts have applied the reasonable-necessity standard to determine if the entity has an obligation to continue providing the facilities taken. See, *e. g.*, 506 F. 2d, at 800; *United States* v. *Streets, Alleys & Public Ways in Stoutsville*, 531 F. 2d 882, 886 (CA8 1976); *United States* v. *Certain Property in Borough of Manhattan*, 403 F. 2d 800 (CA2 1968). This duty may be legally compelled or arise from necessity; "the distinction has little practical significance in public condemnation." *Id.*, at 803. If the condemnee has such a duty to replace the property, these courts have reasoned that only an award of the costs of developing requisite substitute facilities will compensate for the loss.

Whatever the merits of this reasoning with respect to public entities, see n. 3, *supra*, it does not advance analysis here. For respondent is under no legal or factual obligation to replace the camps, regardless of their social worth. As a private entity, respondent is free to allocate its resources to serve its own institutional objectives, which may or may not correspond with community needs. Awarding replacement cost on the

theory that respondent would continue to operate the camps for a public purpose would thus provide a windfall if substitute facilities were never acquired, or if acquired, were later sold or converted to another use.

Finally, that the camps may have benefited the community does not warrant compensating respondent differently from other private owners. The community benefit which the camps conferred might provide an indication of the public's loss upon condemnation of the property. But we cannot accept the Court of Appeals' conclusion that this loss is relevant to assessing the compensation due a private entity. The court noted that "[o]ne rationale for the substitute facilities measure is to indemnify not only the owner of the condemned facilities, but those who have an interest in the continuing existence of the facilities, in this case, according to the Synod, the general public." 576 F. 2d, at 989 n. 4. The guiding principle of just compensation, however, is that the *owner* of the condemned property "must be made whole but is not entitled to more." *Olson* v. *United States*, 292 U. S., at 255. Respondent did not hold its property as the public's trustee and thus is not entitled to be indemnified for the public's loss. Moreover, many condemnees use their property in a manner that confers a benefit on the community, and there is no sound basis for considering this factor only in condemnations of property owned by nonprofit organizations. And to make the measure of compensation depend on a jury's subjective estimation of whether a particular use "benefits" the community would conflict with this Court's efforts to develop relatively objective valuation standards.

In sum, we find no circumstances here that require suspension of the normal rules for determining just compensation. Respondent, like other private owners, is not entitled to recover for nontransferable values arising from its unique need for the property. To the extent denial of such an award departs from the indemnity principle, it is justified by the

necessity for a workable measure of valuation. Allowing respondent the fair market value of its property is thus consistent with the "basic equitable principles of fairness," *United States* v. *Fuller*, 409 U. S. 488, 490 (1973), underlying the Just Compensation Clause.

The judgment of the Court of Appeals is

Reversed.

MR. JUSTICE POWELL took no part in the consideration or decision of this case.

MR. JUSTICE WHITE, concurring.

The Court rejects the claim that the measure of compensation in this case is the cost of substitute facilities rather than the fair market value of the taken property, here camps owned by a private, nonprofit corporation. I am in full agreement. The substitute-facilities doctrine is unrelated to fair market value and does not depend on whether fair market value is readily ascertainable; rather, it unabashedly demands additional compensation over and above market value in order to allow the replacement of the condemned facility.[1] In those cases where it has been applied, primarily where public facilities have been condemned, the basic premise is that the condemnee is under some obligation to continue the functions performed on the taken property.[2] But I do not understand

[1] See 576 F. 2d 983, 991 (CA3 1978), quoted *ante*, at 510 n. 4; *United States* v. *Streets, Alleys & Public Ways in Stoutsville*, 531 F. 2d 882 (CA8 1976); *United States* v. *Certain Property in Borough of Manhattan*, 403 F. 2d 800 (CA2 1968); *United States* v. *Certain Land in Borough of Brooklyn*, 346 F. 2d 690 (CA2 1965); *United States* v. *Board of Education of Mineral County*, 253 F. 2d 760 (CA4 1958); National Conference of Commissioners on Uniform State Laws, Uniform Eminent Domain Code, § 1004 (b).

[2] See, *e. g.*, *United States* v. *Certain Land in Borough of Brooklyn*, *supra*, at 694; 576 F. 2d, at 992–995.

how a duty to replace the condemned facility justifies paying more than market value. Obviously, replacing the old with a new facility will cost more than the value of the old, but the new facility itself will be more valuable and last longer.[3] This is true with respect to condemnation of any facility, whether or not there is an obligation to reproduce it, and I had not understood the Just Compensation Clause to guarantee subsidies to either private or public projects. Similarly, if more demanding building codes or other regulations will enhance the cost of replacement, it is reasonable to assume that compliance itself will be of some benefit to the owner and hence need not be financed by the condemnor.

It may be that a condemnee's obligation to continue the function performed on the condemned property and hence to replace the facility taken will result in loss of value in that the condemnee does not have the option of investing his fair-market-value award in a project that will provide the condemnee with greater net benefits than would replacement of the taken facility. But the existing law imposing the obligation presumably embodies the policy judgment that alternative projects, from which the condemnee might or might not derive more benefits, should not be made available to the condemnee. Even if some incremental loss due to legal constraints on the obligated condemnee's options is thus imposed, it is sheer speculation to assume that this loss will be equal to the full increase in cost of the facility to be reproduced or replaced. It seems to me that the argument for enhanced compensation to the obligated condemnee is nothing more than a particularized submission that the award should exceed

[3] The substitute-facilities measure applied by the Court of Appeals in this case appears to contemplate payment of reproduction costs, not replacement costs, see *id.*, at 999, and n. 2 (Stern, J., concurring); 506 F. 2d 796, 799–800 (CA3 1974). As noted in *United States* v. *Certain Property in Borough of Manhattan*, *supra*, at 804, courts applying the substitute-facilities measure have taken different positions regarding whether depreciation should be deducted from the cost of a new facility.

fair market value because of the unique uses to which the property has been put by the condemnee or because of the unique value the property has for it.

I thus agree with the Court that the Just Compensation Clause does not require payment of the cost of a substitute facility where the condemnee is a private organization, even if it could be said that such an owner is in some sense obligated to replace the property [4] or that the public has a stake in the continuance of the function that is being conducted on the taken property.[5] I also have substantial doubt that the Clause should be any differently construed and applied where public property is condemned, whether or not the function conducted on the property must be continued at another location.[6] That issue, however, is not before the Court and is expressly put aside for another day.

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[4] The Court states that respondent "is under no legal or factual obligation to replace the camps. . . ." *Ante*, at 515. Although respondent, which is subject to the Pennsylvania Nonprofit Corporation Act of 1972, 15 Pa. Cons. Stat. § 7549 (1975), apparently is not legally obliged to replace its camps, other private, nonprofit enterprises may be under a legal obligation—imposed by their own articles of incorporation, by the terms under which gifts are made to them, or directly by state law—to continue financing of certain facilities or functions. Indeed, private organizations operated for profit may be under contractual or other legal obligation to replace a condemned facility.

[5] For purposes of deciding whether an obligation to replace requires a condemnation award greater than market value, it is seemingly irrelevant to whom the benefits of ownership may be said to accrue, be this the "public" or private entities.

[6] Of course, even if this is the proper interpretation of the Just Compensation Clause, Congress could enact legislation providing for compensation under the substitute-facilities approach in those situations in which the United States condemns public property.

BELL, ATTORNEY GENERAL, ET AL. *v.* WOLFISH ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 77–1829. Argued January 16, 1979—Decided May 14, 1979

Respondent inmates brought this class action in Federal District Court challenging the constitutionality of numerous conditions of confinement and practices in the Metropolitan Correctional Center (MCC), a federally operated short-term custodial facility in New York City designed primarily to house pretrial detainees. The District Court, on various constitutional grounds, enjoined, *inter alia*, the practice of housing, primarily for sleeping purposes, two inmates in individual rooms originally intended for single occupancy ("double-bunking"); enforcement of the so-called "publisher-only" rule prohibiting inmates from receiving hard-cover books that are not mailed directly from publishers, book clubs, or bookstores; the prohibition against inmates' receipt of packages of food and personal items from outside the institution; the practice of body-cavity searches of inmates following contact visits with persons from outside the institution; and the requirement that pretrial detainees remain outside their rooms during routine inspections by MCC officials. The Court of Appeals affirmed these rulings, holding with respect to the "double-bunking" practice that the MCC had failed to make a showing of "compelling necessity" sufficient to justify such practice.

Held:

1. The "double-bunking" practice does not deprive pretrial detainees of their liberty without due process of law in contravention of the Fifth Amendment. Pp. 530–543.

(a) There is no source in the Constitution for the Court of Appeals' compelling-necessity standard. Neither the presumption of innocence, the Due Process Clause of the Fifth Amendment, nor a pretrial detainee's right to be free from punishment provides any basis for such standard. Pp. 531–535.

(b) In evaluating the constitutionality of conditions or restrictions of pretrial detention that implicate only the protection against deprivation of liberty without due process of law, the proper inquiry is whether those conditions or restrictions amount to punishment of the detainee. Absent a showing of an expressed intent to punish, if a particular condition or restriction is reasonably related to a legitimate nonpunitive governmental objective, it does not, without more, amount to "punishment," but, conversely, if a condition or restriction is arbitrary or pur-

poseless, a court may permissibly infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees. In addition to ensuring the detainees' presence at trial, the effective management of the detention facility once the individual is confined is a valid objective that may justify imposition of conditions and restrictions of pretrial detention and dispel any inference that such conditions and restrictions are intended as punishment. Pp. 535–540.

(c) Judged by the above analysis and on the record, "double-bunking" as practiced at the MCC did not, as a matter of law, amount to punishment and hence did not violate respondents' rights under the Due Process Clause of the Fifth Amendment. While "double-bunking" may have taxed some of the equipment or particular facilities in certain of the common areas in the MCC, this does not mean that the conditions at the MCC failed to meet the standards required by the Constitution, particularly where it appears that nearly all pretrial detainees are released within 60 days. Pp. 541–543.

2. Nor do the "publisher-only" rule, body-cavity searches, the prohibition against the receipt of packages, or the room-search rule violate any constitutional guarantees. Pp. 544–562.

(a) Simply because prison inmates retain certain constitutional rights does not mean that these rights are not subject to restrictions and limitations. There must be a "mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application," *Wolff* v. *McDonnell*, 418 U. S. 539, 556, and this principle applies equally to pretrial detainees and convicted prisoners. Maintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees. Since problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions, prison administrators should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security. Pp. 544–548.

(b) The "publisher-only" rule does not violate the First Amendment rights of MCC inmates but is a rational response by prison officials to the obvious security problem of preventing the smuggling of contraband in books sent from outside. Moreover, such rule operates in a neutral fashion, without regard to the content of the expression, there are alternative means of obtaining reading material, and the rule's impact on pretrial detainees is limited to a maximum period of approximately 60 days. Pp. 548–552.

(c) The restriction against the receipt of packages from outside the facility does not deprive pretrial detainees of their property without due process of law in contravention of the Fifth Amendment, especially in view of the obvious fact that such packages are handy devices for the smuggling of contraband. Pp. 553–555.

(d) Assuming that a pretrial detainee retains a diminished expectation of privacy after commitment to a custodial facility, the room-search rule does not violate the Fourth Amendment but simply facilitates the safe and effective performance of the searches and thus does not render the searches "unreasonable" within the meaning of that Amendment. Pp. 555–557.

(e) Similarly, assuming that pretrial detainees retain some Fourth Amendment rights upon commitment to a corrections facility, the body-cavity searches do not violate that Amendment. Balancing the significant and legitimate security interests of the institution against the inmates' privacy interests, such searches can be conducted on less than probable cause and are not unreasonable. Pp. 558–560.

(f) None of the security restrictions and practices described above constitute "punishment" in violation of the rights of pretrial detainees under the Due Process Clause of the Fifth Amendment. These restrictions and practices were reasonable responses by MCC officials to legitimate security concerns, and, in any event, were of only limited duration so far as the pretrial detainees were concerned. Pp. 560–562.

573 F. 2d 118, reversed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, and BLACKMUN, JJ., joined. POWELL, J., filed an opinion concurring in part and dissenting in part, *post*, p. 563. MARSHALL, J., filed a dissenting opinion, *post*, p. 563. STEVENS, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 579.

Deputy Solicitor General Frey argued the cause for petitioners. With him on the briefs were *Solicitor General McCree, Assistant Attorney General Heymann, Kent L. Jones,* and *Sidney M. Glazer.*

Phylis Skloot Bamberger argued the cause for respondents. With her on the brief were *William E. Hellerstein, David J. Gottlieb,* and *Michael B. Mushlin.**

*Briefs of *amici curiae* urging affirmance were filed by *Jack Greenberg, James M. Nabrit III,* and *Joel Berger* for the NAACP Legal Defense and

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Over the past five Terms, this Court has in several decisions considered constitutional challenges to prison conditions or practices by convicted prisoners.[1] This case requires us to examine the constitutional rights of pretrial detainees—those persons who have been charged with a crime but who have not yet been tried on the charge. The parties concede that to ensure their presence at trial, these persons legitimately may be incarcerated by the Government prior to a determination of their guilt or innocence, *infra*, at 533–535, and n. 15; see 18 U. S. C. §§ 3146, 3148, and it is the scope of their rights during this period of confinement prior to trial that is the primary focus of this case.

This lawsuit was brought as a class action in the United States District Court for the Southern District of New York to challenge numerous conditions of confinement and practices at the Metropolitan Correctional Center (MCC), a federally operated short-term custodial facility in New York City designed primarily to house pretrial detainees. The District Court, in the words of the Court of Appeals for the Second Circuit, "intervened broadly into almost every facet of the institution" and enjoined no fewer than 20 MCC practices on constitutional and statutory grounds. The Court of Appeals largely affirmed the District Court's constitutional rulings and in the process held that under the Due Process Clause of the Fifth Amendment, pretrial detainees may "be subjected to only those 'restrictions and privations' which 'inhere in their confinement itself or which are justified by

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Educational Fund, Inc., and by *Ralph I. Knowles, Jr.*, and *Alvin J. Bronstein* for the National Prison Project of the American Civil Liberties Union Foundation.

[1] See, *e. g.*, *Hutto* v. *Finney*, 437 U. S. 678 (1978); *Jones* v. *North Carolina Prisoners' Labor Union*, 433 U. S. 119 (1977); *Bounds* v. *Smith*, 430 U. S. 817 (1977); *Meachum* v. *Fano*, 427 U. S. 215 (1976); *Wolff* v. *McDonnell*, 418 U. S. 539 (1974); *Pell* v. *Procunier*, 417 U. S. 817 (1974); *Procunier* v. *Martinez*, 416 U. S. 396 (1974).

compelling necessities of jail administration.'" *Wolfish* v. *Levi*, 573 F. 2d 118, 124 (1978), quoting *Rhem* v. *Malcolm*, 507 F. 2d 333, 336 (CA2 1974). We granted certiorari to consider the important constitutional questions raised by these decisions and to resolve an apparent conflict among the Circuits.[2] 439 U. S. 816 (1978). We now reverse.

I

The MCC was constructed in 1975 to replace the converted waterfront garage on West Street that had served as New York City's federal jail since 1928. It is located adjacent to the Foley Square federal courthouse and has as its primary objective the housing of persons who are being detained in custody prior to trial for federal criminal offenses in the United States District Courts for the Southern and Eastern Districts of New York and for the District of New Jersey. Under the Bail Reform Act, 18 U. S. C. § 3146, a person in the federal system is committed to a detention facility only because no other less drastic means can reasonably ensure his presence at trial. In addition to pretrial detainees, the MCC also houses some convicted inmates who are awaiting sentencing or transportation to federal prison or who are serving generally relatively short sentences in a service capacity at the MCC, convicted prisoners who have been lodged at the facility under writs of habeas corpus *ad prosequendum* or *ad testificandum* issued to ensure their presence at upcoming trials, witnesses in protective custody, and persons incarcerated for contempt.[3]

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[2] See, *e. g.*, *Norris* v. *Frame*, 585 F. 2d 1183 (CA3 1978); *Campbell* v. *McGruder*, 188 U. S. App. D. C. 258, 580 F. 2d 521 (1978); *Wolfish* v. *Levi*, 573 F. 2d 118 (CA2 1978) (case below); *Feeley* v. *Sampson*, 570 F. 2d 364 (CA1 1978); *Main Road* v. *Aytch*, 565 F. 2d 54 (CA3 1977); *Patterson* v. *Morrisette*, 564 F. 2d 1109 (CA4 1977); *Miller* v. *Carson*, 563 F. 2d 741 (CA5 1977); *Duran* v. *Elrod*, 542 F. 2d 998 (CA7 1976).

[3] This group of nondetainees may comprise, on a daily basis, between 40% and 60% of the MCC population. *United States ex rel. Wolfish* v. *United States*, 428 F. Supp. 333, 335 (SDNY 1977). Prior to the District

The MCC differs markedly from the familiar image of a jail; there are no barred cells, dank, colorless corridors, or clanging steel gates. It was intended to include the most advanced and innovative features of modern design of detention facilities. As the Court of Appeals stated: "[I]t represented the architectural embodiment of the best and most progressive penological planning." 573 F. 2d, at 121. The key design element of the 12-story structure is the "modular" or "unit" concept, whereby each floor designed to house inmates has one or two largely self-contained residential units that replace the traditional cellblock jail construction. Each unit in turn has several clusters or corridors of private rooms or dormitories radiating from a central 2-story "multipurpose" or common room, to which each inmate has free access approximately 16 hours a day. Because our analysis does not turn on the particulars of the MCC concept or design, we need not discuss them further.

When the MCC opened in August 1975, the planned capacity was 449 inmates, an increase of 50% over the former West Street facility. *Id.*, at 122. Despite some dormitory accommodations, the MCC was designed primarily to house these inmates in 389 rooms, which originally were intended for single occupancy. While the MCC was under construction, however, the number of persons committed to pretrial detention began to rise at an "unprecedented" rate. *Ibid.* The Bureau of Prisons took several steps to accommodate this unexpected flow of persons assigned to the facility, but despite these efforts, the inmate population at the MCC rose above its planned capacity within a short time after its opening. To provide sleeping space for this increased population, the MCC

Court's order, 50% of *all* MCC inmates spent less than 30 days at the facility and 73% less than 60 days. *United States ex rel. Wolfish* v. *Levi*, 439 F. Supp. 114, 127 (SDNY 1977). However, of the unsentenced detainees, over half spent less than 10 days at the MCC, three-quarters were released within a month and more than 85% were released within 60 days, *Wolfish* v. *Levi*, *supra*, at 129 n. 25.

replaced the single bunks in many of the individual rooms and dormitories with double bunks.[4] Also, each week some newly arrived inmates had to sleep on cots in the common areas until they could be transferred to residential rooms as space became available. See *id.*, at 127–128.

On November 28, 1975, less than four months after the MCC had opened, the named respondents initiated this action by filing in the District Court a petition for a writ of habeas corpus.[5] The District Court certified the case as a class action on behalf of all persons confined at the MCC, pretrial detainees and sentenced prisoners alike.[6] The petition served

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[4] Of the 389 residential rooms at the MCC, 121 had been "designated" for "double-bunking" at the time of the District Court's order. 428 F. Supp., at 336. The number of rooms actually housing two inmates, however, never exceeded 73 and, of these, only 35 were rooms in units that housed pretrial detainees. Brief for Petitioners 7 n. 6; Brief for Respondents 11–12; App. 33–35 (affidavit of Larry Taylor, MCC Warden, dated Dec. 29, 1976).

[5] It appears that the named respondents may now have been transferred or released from the MCC. See *United States ex rel. Wolfish* v. *Levi, supra,* at 119. "This case belongs, however, to that narrow class of cases in which the termination of a class representative's claim does not moot the claims of the unnamed members of the class." *Gerstein* v. *Pugh,* 420 U. S. 103, 110 n. 11 (1975); see *Sosna* v. *Iowa,* 419 U. S. 393 (1975). The named respondents had a case or controversy at the time the complaint was filed and at the time the class action was certified by the District Court pursuant to Fed. Rule Civ. Proc. 23, and there remains a live controversy between petitioners and the members of the class represented by the named respondents. See *Sosna* v. *Iowa, supra,* at 402. Finally, because of the temporary nature of confinement at the MCC, the issues presented are, as in *Sosna* and *Gerstein,* "capable of repetition, yet evading review." 419 U. S., at 400–401; 420 U. S., at 110 n. 11; see *Kremens* v. *Bartley,* 431 U. S. 119, 133 (1977). Accordingly, the requirements of Art. III are met and the case is not moot.

[6] Petitioners apparently never contested the propriety of respondents' use of a writ of habeas corpus to challenge the conditions of their confinement, and petitioners do not raise that question in this Court. However, respondents did plead an alternative basis for jurisdiction in their "Amended Petition" in the District Court—namely, 28 U. S. C. § 1361—

up a veritable potpourri of complaints that implicated virtually every facet of the institution's conditions and practices. Respondents charged, *inter alia*, that they had been deprived of their statutory and constitutional rights because of overcrowded conditions, undue length of confinement, improper searches, inadequate recreational, educational, and employment opportunities, insufficient staff, and objectionable restrictions on the purchase and receipt of personal items and books.[7]

In two opinions and a series of orders, the District Court enjoined numerous MCC practices and conditions. With respect to pretrial detainees, the court held that because they

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that arguably provides jurisdiction. And, at the time of the relevant orders of the District Court in this case, jurisdiction would have been provided by 28 U. S. C. § 1331 (a). Thus, we leave to another day the question of the propriety of using a writ of habeas corpus to obtain review of the conditions of confinement, as distinct from the fact or length of the confinement itself. See *Preiser* v. *Rodriguez*, 411 U. S. 475, 499–500 (1973). See generally *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U. S. 391 (1979).

Similarly, petitioners do not contest the District Court's certification of this case as a class action. For much the same reasons as identified above, there is no need in this case to reach the question whether Fed. Rule Civ. Proc. 23, providing for class actions, is applicable to petitions for habeas corpus relief. Accordingly, we express no opinion as to the correctness of the District Court's action in this regard. See *Middendorf* v. *Henry*, 425 U. S. 25, 30 (1976).

[7] The Court of Appeals described the breadth of this action as follows:

"As an indication of the scope of this action, the amended petition also decried the inadequate phone service; 'strip' searches; room searches outside the inmate's presence; a prohibition against the receipt of packages or the use of personal typewriters; interference with, and monitoring of, personal mail; inadequate and arbitrary disciplinary and grievance procedures; inadequate classification of prisoners; improper treatment of non-English speaking inmates; unsanitary conditions; poor ventilation; inadequate and unsanitary food; the denial of furloughs, unannounced transfers; improper restrictions on religious freedom; and an insufficient and inadequately trained staff." 573 F. 2d, at 123 n. 7.

are "presumed to be innocent and held only to ensure their presence at trial, 'any deprivation or restriction of . . . rights beyond those which are necessary for confinement alone, must be justified by a compelling necessity.' " *United States ex rel. Wolfish* v. *Levi*, 439 F. Supp. 114, 124 (1977), quoting *Detainees of Brooklyn House of Detention* v. *Malcolm*, 520 F. 2d 392, 397 (CA2 1975). And while acknowledging that the rights of sentenced inmates are to be measured by the different standard of the Eighth Amendment, the court declared that to house "an inferior minority of persons . . . in ways found unconstitutional for the rest" would amount to cruel and unusual punishment. *United States ex rel. Wolfish* v. *United States*, 428 F. Supp. 333, 339 (1977).[8]

Applying these standards on cross-motions for partial summary judgment, the District Court enjoined the practice of housing two inmates in the individual rooms and prohibited enforcement of the so-called "publisher-only" rule, which at the time of the court's ruling prohibited the receipt of all books and magazines mailed from outside the MCC except those sent directly from a publisher or a book club.[9] After a trial on the remaining issues, the District Court enjoined, *inter alia*, the doubling of capacity in the dormitory areas, the use of the common rooms to provide temporary sleeping accommodations, the prohibition against inmates' receipt of packages containing food and items of personal property, and the practice of requiring inmates to expose their body cavities for visual inspection following contact visits. The court also

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[8] While most of the District Court's rulings were based on constitutional grounds, the court also held that some of the actions of the Bureau of Prisons were subject to review under the Administrative Procedure Act (APA) and were "arbitrary and capricious" within the meaning of the APA. 439 F. Supp., at 122–123, 141; see n. 11, *infra*.

[9] The District Court also enjoined confiscation of inmate property by prison officials without supplying a receipt and, except under specified circumstances, the reading and inspection of inmates' outgoing and incoming mail. 428 F. Supp., at 341–344. Petitioners do not challenge these rulings.

granted relief in favor of pretrial detainees, but not convicted inmates, with respect to the requirement that detainees remain outside their rooms during routine inspections by MCC officials.[10]

The Court of Appeals largely affirmed the District Court's rulings, although it rejected that court's Eighth Amendment analysis of conditions of confinement for convicted prisoners because the "parameters of judicial intervention into . . . conditions . . . for sentenced prisoners are more restrictive than in the case of pretrial detainees." 573 F. 2d, at 125.[11] Ac-

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[10] The District Court also granted respondents relief on the following issues: classification of inmates and movement between units; length of confinement; law library facilities; the commissary; use of personal typewriters; social and attorney visits; telephone service; inspection of inmates' mail; inmate uniforms; availability of exercise for inmates in administrative detention; food service; access to the bathroom in the visiting area; special diets for Muslim inmates; and women's "lock-in." 439 F. Supp., at 125–165. None of these rulings are before this Court.

[11] The Court of Appeals held that "[a]n institution's obligation under the eighth amendment is at an end if it furnishes sentenced prisoners with adequate food, clothing, shelter, sanitation, medical care, and personal safety." 573 F. 2d, at 125.

The Court of Appeals also held that the District Court's reliance on the APA was erroneous. See n. 8, *supra*. The Court of Appeals concluded that because the Bureau of Prisons' enabling legislation vests broad discretionary powers in the Attorney General, the administration of federal prisons constitutes " 'agency action . . . committed to agency discretion by law' " that is exempt from judicial review under the APA, at least in the absence of a breach of a specific statutory mandate. 573 F. 2d, at 125; see 5 U. S. C. § 701 (a)(2). Because of its holding that the APA was inapplicable to this case, the Court of Appeals reversed the District Court's rulings that the bathroom in the visiting area must be kept unlocked, that prison officials must make a certain level of local and long-distance telephone service available to MCC inmates, that the MCC must maintain unchanged its present schedule for social visits, and that the MCC must take commissary requests every other day. 573 F. 2d, at 125–126, and n. 16. Respondents have not cross petitioned from the Court of Appeals' disposition of the District Court's Eighth Amendment and APA rulings.

cordingly, the court remanded the matter to the District Court for it to determine whether the housing for sentenced inmates at the MCC was constitutionally "adequate." But the Court of Appeals approved the due process standard employed by the District Court in enjoining the conditions of pretrial confinement. It therefore held that the MCC had failed to make a showing of "compelling necessity" sufficient to justify housing two pretrial detainees in the individual rooms. *Id.*, at 126–127. And for purposes of our review (since petitioners challenge only some of the Court of Appeals' rulings), the court affirmed the District Court's granting of relief against the "publisher-only" rule, the practice of conducting body-cavity searches after contact visits, the prohibition against receipt of packages of food and personal items from outside the institution, and the requirement that detainees remain outside their rooms during routine searches of the rooms by MCC officials. *Id.*, at 129–132.[12]

II

As a first step in our decision, we shall address "double-bunking" as it is referred to by the parties, since it is a condition of confinement that is alleged only to deprive pretrial detainees of their liberty without due process of law in contravention of the Fifth Amendment. We will treat in order the Court of Appeals' standard of review, the analysis which we believe the Court of Appeals should have employed,

[12] Although the Court of Appeals held that doubling the capacity of the dormitories was unlawful, it remanded for the District Court to determine "whether any number of inmates in excess of rated capacity could be suitably quartered within the dormitories." *Id.*, at 128. In view of the changed conditions resulting from this litigation, the court also remanded to the District Court for reconsideration of its order limiting incarceration of detainees at the MCC to a period less than 60 days. *Id.*, at 129. The court reversed the District Court's rulings that inmates be permitted to possess typewriters for their personal use in their rooms and that inmates not be required to wear uniforms. *Id.*, at 132–133. None of these rulings are before the Court.

and the conclusions to which our analysis leads us in the case of "double-bunking."

A

The Court of Appeals did not dispute that the Government may permissibly incarcerate a person charged with a crime but not yet convicted to ensure his presence at trial. However, reasoning from the "premise that an individual is to be treated as innocent until proven guilty," the court concluded that pretrial detainees retain the "rights afforded unincarcerated individuals," and that therefore it is not sufficient that the conditions of confinement for pretrial detainees "merely comport with contemporary standards of decency prescribed by the cruel and unusual punishment clause of the eighth amendment." 573 F. 2d, at 124. Rather, the court held, the Due Process Clause requires that pretrial detainees "be subjected to only those 'restrictions and privations' which 'inhere in their confinement itself or which are justified by compelling necessities of jail administration.'" *Ibid.*, quoting *Rhem* v. *Malcolm*, 507 F. 2d, at 336. Under the Court of Appeals' "compelling necessity" standard, "deprivation of the rights of detainees cannot be justified by the cries of fiscal necessity, . . . administrative convenience, . . . or by the cold comfort that conditions in other jails are worse." 573 F. 2d, at 124. The court acknowledged, however, that it could not "ignore" our admonition in *Procunier* v. *Martinez*, 416 U. S. 396, 405 (1974), that "courts are ill equipped to deal with the increasingly urgent problems of prison administration," and concluded that it would "not [be] wise for [it] to second-guess the expert administrators on matters on which they are better informed." 573 F. 2d, at 124.[13]

[13] The NAACP Legal Defense and Educational Fund, Inc., as *amicus curiae*, argues that federal courts have inherent authority to correct conditions of pretrial confinement and that the practices at issue in this case violate the Attorney General's alleged duty to provide inmates with "suitable quarters" under 18 U. S. C. § 4042 (2). Brief for the NAACP

Our fundamental disagreement with the Court of Appeals is that we fail to find a source in the Constitution for its compelling-necessity standard.[14] Both the Court of Appeals and the District Court seem to have relied on the "presumption of innocence" as the source of the detainee's substantive right to be free from conditions of confinement that are not justified by compelling necessity. 573 F. 2d, at 124; 439 F. Supp., at 124; accord, *Campbell* v. *McGruder*, 188 U. S. App. D. C. 258, 266, 580 F. 2d 521, 529 (1978); *Detainees of Brooklyn House of Detention* v. *Malcolm*, 520 F. 2d 392, 397 (CA2 1975); *Rhem* v. *Malcolm, supra*, at 336. But see *Feeley* v. *Sampson*, 570 F. 2d 364, 369 n. 4 (CA1 1978); *Hampton* v. *Holmesburg Prison Officials*, 546 F. 2d 1077, 1080 n. 1 (CA3 1976). But the presumption of innocence provides no support for such a rule.

Legal Defense and Educational Fund, Inc., as *Amicus Curiae* 22–46. Neither argument was presented to or passed on by the lower courts; nor have they been urged by either party in this Court. Accordingly, we have no occasion to reach them in this case. *Knetsch* v. *United States*, 364 U. S. 361, 370 (1960).

[14] As authority for its compelling-necessity test, the court cited three of its prior decisions, *Rhem* v. *Malcolm*, 507 F. 2d 333 (CA2 1974) (*Rhem I*); *Detainees of Brooklyn House of Detention* v. *Malcolm*, 520 F. 2d 392 (CA2 1975); and *Rhem* v. *Malcolm*, 527 F. 2d 1041 (CA2 1975) (*Rhem II*). *Rhem I*'s support for the compelling-necessity test came from *Brenneman* v. *Madigan*, 343 F. Supp. 128, 142 (ND Cal. 1972), which in turn cited no cases in support of its statement of the relevant test. *Detainees* found support for the compelling-necessity standard in *Shapiro* v. *Thompson*, 394 U. S. 618 (1969); *Tate* v. *Short*, 401 U. S. 395 (1971); *Williams* v. *Illinois*, 399 U. S. 235 (1970); and *Shelton* v. *Tucker*, 364 U. S. 479 (1960). But *Tate* and *Williams* dealt with equal protection challenges to imprisonment based on inability to pay fines or costs. Similarly, *Shapiro* concerned equal protection challenges to state welfare eligibility requirements found to violate the constitutional right to travel. In *Shelton*, the Court held that a school board policy requiring disclosure of personal associations violated the First and Fourteenth Amendment rights of a teacher. None of these cases support the court's compelling-necessity test. Finally, *Rhem II* merely relied on *Rhem I* and *Detainees*.

The presumption of innocence is a doctrine that allocates the burden of proof in criminal trials; it also may serve as an admonishment to the jury to judge an accused's guilt or innocence solely on the evidence adduced at trial and not on the basis of suspicions that may arise from the fact of his arrest, indictment, or custody, or from other matters not introduced as proof at trial. *Taylor* v. *Kentucky,* 436 U. S. 478, 485 (1978); see *Estelle* v. *Williams,* 425 U. S. 501 (1976); *In re Winship,* 397 U. S. 358 (1970); 9 J. Wigmore, Evidence § 2511 (3d ed. 1940). It is "an inaccurate, shorthand description of the right of the accused to 'remain inactive and secure, until the prosecution has taken up its burden and produced evidence and effected persuasion; . . .' an 'assumption' that is indulged in the absence of contrary evidence." *Taylor* v. *Kentucky, supra,* at 484 n. 12. Without question, the presumption of innocence plays an important role in our criminal justice system. "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Coffin* v. *United States,* 156 U. S. 432, 453 (1895). But it has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun.

The Court of Appeals also relied on what it termed the "indisputable rudiments of due process" in fashioning its compelling-necessity test. We do not doubt that the Due Process Clause protects a detainee from certain conditions and restrictions of pretrial detainment. See *infra,* at 535–540. Nonetheless, that Clause provides no basis for application of a compelling-necessity standard to conditions of pretrial confinement that are not alleged to infringe any other, more specific guarantee of the Constitution.

It is important to focus on what is at issue here. We are not concerned with the initial decision to detain an accused and the curtailment of liberty that such a decision necessarily

entails. See *Gerstein* v. *Pugh*, 420 U. S. 103, 114 (1975); *United States* v. *Marion*, 404 U. S. 307, 320 (1971). Neither respondents nor the courts below question that the Government may permissibly detain a person suspected of committing a crime prior to a formal adjudication of guilt. See *Gerstein* v. *Pugh*, *supra*, at 111–114. Nor do they doubt that the Government has a substantial interest in ensuring that persons accused of crimes are available for trials and, ultimately, for service of their sentences, or that confinement of such persons pending trial is a legitimate means of furthering that interest. Tr. of Oral Arg. 27; see *Stack* v. *Boyle*, 342 U. S. 1, 4 (1951).[15] Instead, what *is* at issue when an aspect of pretrial detention that is not alleged to violate any express guarantee of the Constitution is challenged, is the detainee's right to be free from punishment, see *infra*, at 535–537, and his understandable desire to be as comfortable as possible during his confinement, both of which may conceivably coalesce at some point. It seems clear that the Court of Appeals did not rely on the detainee's right to be free from punishment, but even if it had that right does not warrant adoption of that court's compelling-necessity test. See *infra*, at 535–540. And to the extent the court relied on the detainee's desire to be free from discomfort, it suffices to say that this desire simply does not rise to the level of those fundamental liberty interests delineated in cases such as *Roe* v. *Wade*, 410 U. S. 113 (1973);

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[15] In order to imprison a person prior to trial, the Government must comply with constitutional requirements, *Gerstein* v. *Pugh*, 420 U. S., at 114; *Stack* v. *Boyle*, 342 U. S., at 5, and any applicable statutory provisions, *e. g.*, 18 U. S. C. §§ 3146, 3148. Respondents do not allege that the Government failed to comply with the constitutional or statutory requisites to pretrial detention.

The only justification for pretrial detention asserted by the Government is to ensure the detainees' presence at trial. Brief for Petitioners 43. Respondents do not question the legitimacy of this goal. Brief for Respondents 33; Tr. of Oral Arg. 27. We, therefore, have no occasion to consider whether any other governmental objectives may constitutionally justify pretrial detention.

Eisenstadt v. *Baird*, 405 U. S. 438 (1972); *Stanley* v. *Illinois*, 405 U. S. 645 (1972); *Griswold* v. *Connecticut*, 381 U. S. 479 (1965); *Meyer* v. *Nebraska*, 262 U. S. 390 (1923).

B

In evaluating the constitutionality of conditions or restrictions of pretrial detention that implicate only the protection against deprivation of liberty without due process of law, we think that the proper inquiry is whether those conditions amount to punishment of the detainee.[16] For under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.[17]

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[16] The Court of Appeals properly relied on the Due Process Clause rather than the Eighth Amendment in considering the claims of pretrial detainees. Due process requires that a pretrial detainee not be punished. A sentenced inmate, on the other hand, may be punished, although that punishment may not be "cruel and unusual" under the Eighth Amendment. The Court recognized this distinction in *Ingraham* v. *Wright*, 430 U. S. 651, 671–672, n. 40 (1977):

"Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions. See *United States* v. *Lovett*, 328 U. S. 303, 317–318 (1946). . . . [T]he State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law. Where the State seeks to impose punishment without such an adjudication, the pertinent constitutional guarantee is the Due Process Clause of the Fourteenth Amendment."

[17] Mr. Justice Stevens in dissent claims that this holding constitutes a departure from our prior due process cases, specifically *Leis* v. *Flynt*, 439 U. S. 438 (1979), and *Paul* v. *Davis*, 424 U. S. 693 (1976). *Post*, at 580–581, and n. 6. But as the citations following our textual statement indicate, we leave prior decisional law as we find it and simply apply it to the case at bar. For example, in *Wong Wing* v. *United States*, 163 U. S. 228, 237 (1896), the Court held that the subjection of persons to punishment at hard labor must be preceded by a judicial trial to establish guilt. And in *Ingraham* v. *Wright*, *supra*, at 674, we stated that "at least where school authorities, acting under color of state law, deliberately

See *Ingraham* v. *Wright*, 430 U. S. 651, 671–672 n. 40, 674 (1977); *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 165–167, 186 (1963); *Wong Wing* v. *United States*, 163 U. S. 228, 237 (1896). A person lawfully committed to pretrial detention has not been adjudged guilty of any crime. He has had only a "judicial determination of probable cause as a prerequisite to [the] extended restraint of [his] liberty following arrest." *Gerstein* v. *Pugh*, *supra*, at 114; see *Virginia* v. *Paul*, 148 U. S. 107, 119 (1893). And, if he is detained for a suspected violation of a federal law, he also has had a bail hearing. See 18 U. S. C. §§ 3146, 3148.[18] Under such circumstances, the Government concededly may detain him to ensure his presence at trial and may subject him to the restrictions and conditions of the detention facility so long as those conditions and restric-

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decide to *punish* a child for misconduct by restraining the child and inflicting appreciable physical pain, we hold that Fourteenth Amendment liberty interests are implicated." (Emphasis supplied.) Thus, there is neither novelty nor inconsistency in our holding that the Fifth Amendment includes freedom from punishment within the liberty of which no person may be deprived without due process of law.

We, of course, do not mean by the textual discussion of the rights of pretrial detainees to cast doubt on any historical exceptions to the general principle that punishment can only follow a determination of guilt after trial or plea—exceptions such as the power summarily to punish for contempt of court. See, *e. g.*, *United States* v. *Wilson*, 421 U. S. 309 (1975); *Bloom* v. *Illinois*, 391 U. S. 194 (1968); *United States* v. *Barnett*, 376 U. S. 681 (1964); *Cooke* v. *United States*, 267 U. S. 517 (1925); *Ex parte Terry*, 128 U. S. 289 (1888); Fed. Rule Crim. Proc. 42.

[18] The Bail Reform Act of 1966 establishes a liberal policy in favor of pretrial release. 18 U. S. C. §§ 3146, 3148. Section 3146 provides in pertinent part:

"Any person charged with an offense, other than an offense punishable by death, shall, at his appearance before a judicial officer, be ordered released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer, unless the officer determines, in the exercise of his discretion, that such a release will not reasonably assure the appearance of the person as required."

tions do not amount to punishment, or otherwise violate the Constitution.

Not every disability imposed during pretrial detention amounts to "punishment" in the constitutional sense, however. Once the Government has exercised its conceded authority to detain a person pending trial, it obviously is entitled to employ devices that are calculated to effectuate this detention. Traditionally, this has meant confinement in a facility which, no matter how modern or how antiquated, results in restricting the movement of a detainee in a manner in which he would not be restricted if he simply were free to walk the streets pending trial. Whether it be called a jail, a prison, or a custodial center, the purpose of the facility is to detain. Loss of freedom of choice and privacy are inherent incidents of confinement in such a facility. And the fact that such detention interferes with the detainee's understandable desire to live as comfortably as possible and with as little restraint as possible during confinement does not convert the conditions or restrictions of detention into "punishment."

This Court has recognized a distinction between punitive measures that may not constitutionally be imposed prior to a determination of guilt and regulatory restraints that may. See, *e. g., Kennedy* v. *Mendoza-Martinez, supra,* at 168; *Flemming* v. *Nestor,* 363 U. S. 603, 613–614 (1960); cf. *De Veau* v. *Braisted,* 363 U. S. 144, 160 (1960). In *Kennedy* v. *Mendoza-Martinez, supra,* the Court examined the automatic forfeiture-of-citizenship provisions of the immigration laws to determine whether that sanction amounted to punishment or a mere regulatory restraint. While it is all but impossible to compress the distinction into a sentence or a paragraph, the Court there described the tests traditionally applied to determine whether a governmental act is punitive in nature:

> "Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding

> of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions." 372 U. S., at 168–169 (footnotes omitted).

Because forfeiture of citizenship traditionally had been considered punishment and the legislative history of the forfeiture provisions "conclusively" showed that the measure was intended to be punitive, the Court held that forfeiture of citizenship in such circumstances constituted punishment that could not constitutionally be imposed without due process of law. *Id.*, at 167–170, 186.

The factors identified in *Mendoza-Martinez* provide useful guideposts in determining whether particular restrictions and conditions accompanying pretrial detention amount to punishment in the constitutional sense of that word. A court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose. See *Flemming* v. *Nestor*, *supra*, at 613–617.[19] Absent a showing of an expressed intent to punish on the part of detention facility officials, that determination generally will turn on "whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it]." *Kennedy* v. *Mendoza-Martinez*, *supra*, at 168–169; see *Flemming* v.

[19] As Mr. Justice Frankfurter stated in *United States* v. *Lovett*, 328 U. S. 303, 324 (1946) (concurring opinion): "The fact that harm is inflicted by governmental authority does not make it punishment. Figuratively speaking all discomforting action may be deemed punishment because it deprives of what otherwise would be enjoyed. But there may be reasons other than punitive for such deprivation."

Nestor, supra, at 617. Thus, if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to "punishment."[20] Conversely, if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees. See *ibid.*[21] Courts must be mindful that these inquiries spring from constitutional requirements and that judicial answers to them must reflect that fact rather than a court's idea of how best to operate a detention facility. Cf. *United States* v. *Lovasco,* 431 U. S. 783, 790 (1977); *United States* v. *Russell,* 411 U. S. 423, 435 (1973).

One further point requires discussion. The petitioners assert, and respondents concede, that the "essential objective of pretrial confinement is to insure the detainees' presence at trial." Brief for Petitioners 43; see Brief for Respondents 33. While this interest undoubtedly justifies the original decision to confine an individual in some manner, we do not accept

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[20] This is not to say that the officials of a detention facility can justify punishment. They cannot. It is simply to say that in the absence of a showing of intent to punish, a court must look to see if a particular restriction or condition, which may on its face appear to be punishment, is instead but an incident of a legitimate nonpunitive governmental objective. See *Kennedy* v. *Mendoza-Martinez,* 372 U. S., at 168; *Flemming* v. *Nestor,* 363 U. S., at 617. Retribution and deterrence are not legitimate nonpunitive governmental objectives. *Kennedy* v. *Mendoza-Martinez, supra,* at 168. Conversely, loading a detainee with chains and shackles and throwing him in a dungeon may ensure his presence at trial and preserve the security of the institution. But it would be difficult to conceive of a situation where conditions so harsh, employed to achieve objectives that could be accomplished in so many alternative and less harsh methods, would not support a conclusion that the purpose for which they were imposed was to punish.

[21] "There is, of course, a *de minimis* level of imposition with which the Constitution is not concerned." *Ingraham* v. *Wright,* 430 U. S., at 674.

respondents' argument that the Government's interest in ensuring a detainee's presence at trial is the *only* objective that may justify restraints and conditions once the decision is lawfully made to confine a person. "If the government could confine or otherwise infringe the liberty of detainees only to the extent necessary to ensure their presence at trial, house arrest would in the end be the only constitutionally justified form of detention." *Campbell* v. *McGruder,* 188 U. S. App. D. C., at 266, 580 F. 2d, at 529. The Government also has legitimate interests that stem from its need to manage the facility in which the individual is detained. These legitimate operational concerns may require administrative measures that go beyond those that are, strictly speaking, necessary to ensure that the detainee shows up at trial. For example, the Government must be able to take steps to maintain security and order at the institution and make certain no weapons or illicit drugs reach detainees.[22] Restraints that are reasonably related to the institution's interest in maintaining jail security do not, without more, constitute unconstitutional punishment, even if they are discomforting and are restrictions that the detainee would not have experienced had he been released while awaiting trial. We need not here attempt to detail the precise extent of the legitimate governmental interests that may justify conditions or restrictions of pretrial detention. It is enough simply to recognize that in addition to ensuring the detainees' presence at trial, the effective management of the detention facility once the individual is confined is a valid objective that may justify imposition of conditions and restrictions of pretrial detention and dispel any inference that such restrictions are intended as punishment.[23]

[22] In fact, security measures may directly serve the Government's interest in ensuring the detainee's presence at trial. See *Feeley* v. *Sampson,* 570 F. 2d, at 369.

[23] In determining whether restrictions or conditions are reasonably related to the Government's interest in maintaining security and order and operating the institution in a manageable fashion, courts must heed

C

Judged by this analysis, respondents' claim that "double-bunking" violated their due process rights fails. Neither the District Court nor the Court of Appeals intimated that it considered "double-bunking" to constitute punishment; instead, they found that it contravened the compelling-necessity test, which today we reject. On this record, we are convinced as a matter of law that "double-bunking" as practiced at the MCC did not amount to punishment and did not, therefore, violate respondents' rights under the Due Process Clause of the Fifth Amendment.[24]

Each of the rooms at the MCC that house pretrial detainees has a total floor space of approximately 75 square feet. Each of them designated for "double-bunking," see n. 4, *supra*, contains a double bunkbed, certain other items of furniture, a wash basin, and an uncovered toilet. Inmates generally are locked into their rooms from 11 p.m. to 6:30 a.m. and for brief periods during the afternoon and evening head counts. During the rest of the day, they may move about freely between their rooms and the common areas.

Based on affidavits and a personal visit to the facility, the District Court concluded that the practice of "double-bunking" was unconstitutional. The court relied on two factors for its conclusion: (1) the fact that the rooms were designed to house only one inmate, 428 F. Supp., at 336–337; and (2) its judg-

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our warning that "[s]uch considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters." *Pell* v. *Procunier*, 417 U. S., at 827; see *Jones* v. *North Carolina Prisoners' Labor Union*, 433 U. S. 119 (1977); *Meachum* v. *Fano*, 427 U. S. 215 (1976); *Procunier* v. *Martinez*, 416 U. S. 396 (1974).

[24] The District Court found that there were no disputed issues of material fact with respect to respondents' challenge to "double-bunking." 428 F. Supp., at 335. We agree with the District Court in this determination.

ment that confining two persons in one room or cell of this size constituted a "fundamental denia[l] of decency, privacy, personal security, and, simply, civilized humanity . . . ." *Id.*, at 339. The Court of Appeals agreed with the District Court. In response to petitioners' arguments that the rooms at the MCC were larger and more pleasant than the cells involved in the cases relied on by the District Court, the Court of Appeals stated:

> "[W]e find the lack of privacy inherent in double-celling in rooms intended for one individual a far more compelling consideration than a comparison of square footage or the substitution of doors for bars, carpet for concrete, or windows for walls. The government has simply failed to show any substantial justification for double-celling." 573 F. 2d, at 127.

We disagree with both the District Court and the Court of Appeals that there is some sort of "one man, one cell" principle lurking in the Due Process Clause of the Fifth Amendment. While confining a given number of people in a given amount of space in such a manner as to cause them to endure genuine privations and hardship over an extended period of time might raise serious questions under the Due Process Clause as to whether those conditions amounted to punishment, nothing even approaching such hardship is shown by this record.[25]

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[25] Respondents seem to argue that "double-bunking" was unreasonable because petitioners were able to comply with the District Court's order forbidding "double-bunking" and still accommodate the increased numbers of detainees simply by transferring all but a handful of sentenced inmates who had been assigned to the MCC for the purpose of performing certain services and by committing those tasks to detainees. Brief for Respondents 50. That petitioners were able to comply with the District Court's order in this fashion does not mean that petitioners' chosen method of coping with the increased inmate population—"double-bunking"—was unreasonable. Governmental action does not have to be the only alternative or even the best alternative for it to be reasonable, to say nothing of constitu-

Detainees are required to spend only seven or eight hours each day in their rooms, during most or all of which they presumably are sleeping. The rooms provide more than adequate space for sleeping.[26] During the remainder of the time, the detainees are free to move between their rooms and the common area. While "double-bunking" may have taxed some of the equipment or particular facilities in certain of the common areas, *United States ex rel. Wolfish* v. *United States*, 428 F. Supp., at 337, this does not mean that the conditions at the MCC failed to meet the standards required by the Constitution. Our conclusion in this regard is further buttressed by the detainees' length of stay at the MCC. See *Hutto* v. *Finney*, 437 U. S. 678, 686–687 (1978). Nearly all of the detainees are released within 60 days. See n. 3, *supra*. We simply do not believe that requiring a detainee to share toilet facilities and this admittedly rather small sleeping place with another person for generally a maximum period of 60 days violates the Constitution.[27]

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tional. See *Vance* v. *Bradley*, 440 U. S. 93 (1979); *Dandridge* v. *Williams*, 397 U. S. 471, 485 (1970).

That petitioners were able to comply with the District Court order also does not make this case moot, because petitioners still dispute the legality of the court's order and they have informed the Court that there is a reasonable expectation that they may be required to "double-bunk" again. Reply Brief for Petitioners 6; Tr. of Oral Arg. 33–35, 56–57; see *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 632–633 (1953).

[26] We thus fail to understand the emphasis of the Court of Appeals and the District Court on the amount of walking space in the "double-bunked" rooms. See 573 F. 2d, at 127; 428 F. Supp., at 337.

[27] Respondents' reliance on other lower court decisions concerning minimum space requirements for different institutions and on correctional standards issued by various groups is misplaced. Brief for Respondents 41, and nn. 40 and 41; see, *e. g.*, *Campbell* v. *McGruder*, 188 U. S. App. D. C. 258, 580 F. 2d 521 (1978); *Battle* v. *Anderson*, 564 F. 2d 388 (CA10 1977); *Chapman* v. *Rhodes*, 434 F. Supp. 1007 (SD Ohio 1977); *Inmates of Suffolk County Jail* v. *Eisenstadt*, 360 F. Supp. 676 (Mass. 1973); American Public Health Assn., Standards for Health Services in Correctional Institutions 62 (1976); American Correctional Assn., Manual of

III

Respondents also challenged certain MCC restrictions and practices that were designed to promote security and order at the facility on the ground that these restrictions violated the Due Process Clause of the Fifth Amendment, and certain other constitutional guarantees, such as the First and Fourth Amendments. The Court of Appeals seemed to approach the challenges to security restrictions in a fashion different from the other contested conditions and restrictions. It stated that "once it has been determined that the mere fact of confinement of the detainee justifies the restrictions, the institution must be permitted to use reasonable means to insure that its legitimate interests in security are safeguarded." 573 F. 2d, at 124. The court might disagree with the choice of means to effectuate those interests, but it should not "second-guess the expert administrators on matters on which they are better informed . . . . Concern with minutiae of prison administration can only distract the court from detached consideration of the one overriding question presented to it: does the practice or condition violate the Constitution?" *Id.*, at 124–125. Nonetheless, the court affirmed the District Court's injunction

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Standards for Adult Correctional Institutions, Standard No. 4142, p. 27 (1977); National Sheriffs' Assn., A Handbook on Jail Architecture 63 (1975). The cases cited by respondents concerned facilities markedly different from the MCC. They involved traditional jails and cells in which inmates were locked during most of the day. Given this factual disparity, they have little or no application to the case at hand. Thus, we need not and do not decide whether we agree with the reasoning and conclusions of these cases. And while the recommendations of these various groups may be instructive in certain cases, they simply do not establish the constitutional minima; rather, they establish goals recommended by the organization in question. For this same reason, the draft recommendations of the Federal Corrections Policy Task Force of the Department of Justice regarding conditions of confinement for pretrial detainees are not determinative of the requirements of the Constitution. See Dept. of Justice, Federal Corrections Policy Task Force, Federal Standards for Corrections (Draft, June 1978).

against several security restrictions. The court rejected the arguments of petitioners that these practices served the MCC's interest in security and order and held that the practices were unjustified interferences with the retained constitutional rights of *both* detainees and convicted inmates. *Id.*, at 129–132. In our view, the Court of Appeals failed to heed its own admonition not to "second-guess" prison administrators.

Our cases have established several general principles that inform our evaluation of the constitutionality of the restrictions at issue. First, we have held that convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison. See *Jones* v. *North Carolina Prisoners' Labor Union*, 433 U. S. 119, 129 (1977); *Meachum* v. *Fano*, 427 U. S. 215, 225 (1976); *Wolff* v. *McDonnell*, 418 U. S. 539, 555–556 (1974); *Pell* v. *Procunier*, 417 U. S. 817, 822 (1974). "There is no iron curtain drawn between the Constitution and the prisons of this country." *Wolff* v. *McDonnell*, *supra*, at 555–556. So, for example, our cases have held that sentenced prisoners enjoy freedom of speech and religion under the First and Fourteenth Amendments, see *Pell* v. *Procunier*, *supra*; *Cruz* v. *Beto*, 405 U. S. 319 (1972); *Cooper* v. *Pate*, 378 U. S. 546 (1964); that they are protected against invidious discrimination on the basis of race under the Equal Protection Clause of the Fourteenth Amendment, see *Lee* v. *Washington*, 390 U. S. 333 (1968); and that they may claim the protection of the Due Process Clause to prevent additional deprivation of life, liberty, or property without due process of law, see *Meachum* v. *Fano*, *supra*; *Wolff* v. *McDonnell*, *supra*. *A fortiori*, pretrial detainees, who have not been convicted of any crimes, retain at least those constitutional rights that we have held are enjoyed by convicted prisoners.

But our cases also have insisted on a second proposition: simply because prison inmates retain certain constitutional rights does not mean that these rights are not subject to restrictions and limitations. "Lawful incarceration brings

about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Price* v. *Johnston*, 334 U. S. 266, 285 (1948); see *Jones* v. *North Carolina Prisoners' Labor Union, supra*, at 125; *Wolff* v. *McDonnell, supra*, at 555; *Pell* v. *Procunier, supra*, at 822. The fact of confinement as well as the legitimate goals and policies of the penal institution limits these retained constitutional rights. *Jones* v. *North Carolina Prisoners' Labor Union, supra*, at 125; *Pell* v. *Procunier, supra*, at 822. There must be a "mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application." *Wolff* v. *McDonnell, supra*, at 556. This principle applies equally to pretrial detainees and convicted prisoners. A detainee simply does not possess the full range of freedoms of an unincarcerated individual.

Third, maintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees.[28] "[C]entral to all other corrections goals is the institutional

[28] Neither the Court of Appeals nor the District Court distinguished between pretrial detainees and convicted inmates in reviewing the challenged security practices, and we see no reason to do so. There is no basis for concluding that pretrial detainees pose any lesser security risk than convicted inmates. Indeed, it may be that in certain circumstances they present a greater risk to jail security and order. See, *e. g.*, *Main Road* v. *Aytch*, 565 F. 2d, at 57. In the federal system, a detainee is committed to the detention facility only because no other less drastic means can reasonably assure his presence at trial. See 18 U. S. C. § 3146. As a result, those who are detained prior to trial may in many cases be individuals who are charged with serious crimes or who have prior records. They also may pose a greater risk of escape than convicted inmates. See Joint App. in Nos. 77–2035, 77–2135 (CA2), pp. 1393–1398, 1531–1532. This may be particularly true at facilities like the MCC, where the resident convicted inmates have been sentenced to only short terms of incarceration and many of the detainees face the possibility of lengthy imprisonment if convicted.

consideration of internal security within the corrections facilities themselves." *Pell* v. *Procunier, supra,* at 823; see *Jones v. North Carolina Prisoners' Labor Union, supra,* at 129; *Procunier* v. *Martinez,* 416 U. S. 396, 412 (1974). Prison officials must be free to take appropriate action to ensure the safety of inmates and corrections personnel and to prevent escape or unauthorized entry. Accordingly, we have held that even when an institutional restriction infringes a specific constitutional guarantee, such as the First Amendment, the practice must be evaluated in the light of the central objective of prison administration, safeguarding institutional security. *Jones* v. *North Carolina Prisoners' Labor Union, supra,* at 129; *Pell* v. *Procunier, supra,* at 822, 826; *Procunier* v. *Martinez, supra,* at 412–414.

Finally, as the Court of Appeals correctly acknowledged, the problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions. Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security. *Jones* v. *North Carolina Prisoners' Labor Union, supra,* at 128; *Procunier* v. *Martinez, supra,* at 404–405; *Cruz* v. *Beto, supra,* at 321; see *Meachum* v. *Fano,* 427 U. S., at 228–229.[29] "Such

[29] Respondents argue that this Court's cases holding that substantial deference should be accorded prison officials are not applicable to this case because those decisions concerned convicted inmates, not pretrial detainees. Brief for Respondents 52. We disagree. Those decisions held that courts should defer to the informed discretion of prison administrators because the realities of running a corrections institution are complex and difficult, courts are ill equipped to deal with these problems, and the management of these facilities is confided to the Executive and Legislative Branches, not to the Judicial Branch. See *Jones* v. *North Carolina Prisoners' Labor Union,* 433 U. S., at 126; *Pell* v. *Procunier,* 417 U. S., at 827; *Procunier* v. *Martinez,* 416 U. S., at 404–405. While those cases each concerned restrictions governing convicted inmates, the principle of deference enunciated in them is not dependent on that happenstance.

considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters." *Pell* v. *Procunier*, 417 U. S., at 827.[30] We further observe that, on occasion, prison administrators may be "experts" only by Act of Congress or of a state legislature. But judicial deference is accorded not merely because the administrator ordinarily will, as a matter of fact in a particular case, have a better grasp of his domain than the reviewing judge, but also because the operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial. *Procunier* v. *Martinez*, *supra*, at 405; cf. *Meachum* v. *Fano*, *supra*, at 229. With these teachings of our cases in mind, we turn to an examination of the MCC security practices that are alleged to violate the Constitution.

A

At the time of the lower courts' decisions, the Bureau of Prisons' "publisher-only" rule, which applies to all Bureau

[30] What the Court said in *Procunier* v. *Martinez* bears repeating here: "Prison administrators are responsible for maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody. The Herculean obstacles to effective discharge of these duties are too apparent to warrant explication. Suffice it to say that the problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. For all of those reasons, courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism." *Ibid.*

facilities, permitted inmates to receive books and magazines from outside the institution only if the materials were mailed directly from the publisher or a book club. 573 F. 2d, at 129–130. The warden of the MCC stated in an affidavit that "serious" security and administrative problems were caused when bound items were received by inmates from unidentified sources outside the facility. App. 24. He noted that in order to make a "proper and thorough" inspection of such items, prison officials would have to remove the covers of hardback books and to leaf through every page of all books and magazines to ensure that drugs, money, weapons, or other contraband were not secreted in the material. "This search process would take a substantial and inordinate amount of available staff time." *Ibid.* However, "there is relatively little risk that material received directly from a publisher or book club would contain contraband, and therefore, the security problems are significantly reduced without a drastic drain on staff resources." *Ibid.*

The Court of Appeals rejected these security and administrative justifications and affirmed the District Court's order enjoining enforcement of the "publisher-only" rule at the MCC. The Court of Appeals held that the rule "severely and impermissibly restricts the reading material available to inmates" and therefore violates their First Amendment and due process rights. 573 F. 2d, at 130.

It is desirable at this point to place in focus the precise question that now is before this Court. Subsequent to the decision of the Court of Appeals, the Bureau of Prisons amended its "publisher-only" rule to permit the receipt of books and magazines from bookstores as well as publishers and book clubs. 43 Fed. Reg. 30576 (1978) (to be codified in 28 CFR § 540.71). In addition, petitioners have informed the Court that the Bureau proposes to amend the rule further to allow receipt of paperback books, magazines, and other soft-covered materials from any source. Brief for Petitioners 66 n. 49, 69, and n. 51. The Bureau regards hardback books as

the "more dangerous source of risk to institutional security," however, and intends to retain the prohibition against receipt of hardback books unless they are mailed directly from publishers, book clubs, or bookstores. *Id.*, at 69 n. 51. Accordingly, petitioners request this Court to review the District Court's injunction only to the extent it enjoins petitioners from prohibiting receipt of hard-cover books that are not mailed directly from publishers, book clubs, or bookstores. *Id.*, at 69; Tr. of Oral Arg. 59–60.[31]

We conclude that a prohibition against receipt of hardback books unless mailed directly from publishers, book clubs, or bookstores does not violate the First Amendment rights of MCC inmates. That limited restriction is a rational response by prison officials to an obvious security problem. It hardly

[31] Because of the changes in the "publisher-only" rule, some of which apparently occurred after we granted certiorari, respondents, citing *Sanks* v. *Georgia*, 401 U. S. 144 (1971), urge the Court to dismiss the writ of certiorari as improvidently granted with respect to the validity of the rule, as modified. Brief for Respondents 68. *Sanks*, however, is quite different from the instant case. In *Sanks* the events that transpired after probable jurisdiction was noted "had so drastically undermined the premises on which we originally set [the] case for plenary consideration as to lead us to conclude that, with due regard for the proper functioning of this Court, we should not . . . adjudicate it." 401 U. S., at 145. The focus of that case had been "completely blurred, if not altogether obliterated," and a judgment on the issues involved had become "potentially immaterial." *Id.*, at 152. This is not true here. Unlike the situation in *Sanks*, the Government has not substituted an entirely different regulatory scheme and wholly abandoned the restrictions that were invalidated below. There is still a dispute, which is not "blurred" or "obliterated," on which a judgment will not be "immaterial." Petitioners merely have chosen to limit their disagreement with the lower courts' rulings. Also, the question that is now posed is fairly comprised within the questions presented in the petition for certiorari. See Pet. for Cert. 2 ("[w]hether the governmental interest in maintaining jail security and order justifies rules that . . . (b) prohibit receipt at the jail of books and magazines that are not mailed directly from publishers"). See this Court's Rule 23 (1)(c). We, of course, express no view as to the validity of those portions of the lower courts' rulings that concern magazines or soft-cover books.

needs to be emphasized that hardback books are especially serviceable for smuggling contraband into an institution; money, drugs, and weapons easily may be secreted in the bindings. *E. g., Woods* v. *Daggett,* 541 F. 2d 237 (CA10 1976).[32] They also are difficult to search effectively. There is simply no evidence in the record to indicate that MCC officials have exaggerated their response to this security problem and to the administrative difficulties posed by the necessity of carefully inspecting each book mailed from unidentified sources. Therefore, the considered judgment of these experts must control in the absence of prohibitions far more sweeping than those involved here. See *Jones* v. *North Carolina Prisoners' Labor Union,* 433 U. S., at 128; *Pell* v. *Procunier,* 417 U. S., at 827.

Our conclusion that this limited restriction on receipt of hardback books does not infringe the First Amendment rights of MCC inmates is influenced by several other factors. The rule operates in a neutral fashion, without regard to the content of the expression. *Id.,* at 828. And there are alternative means of obtaining reading material that have not been shown to be burdensome or insufficient. "[W]e regard the

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[32] The District Court stated: "With no record of untoward experience at places like the MCC, and with no history of resort to less restrictive measures, [petitioners'] invocation of security cannot avail with respect to the high constitutional interests here at stake." 428 F. Supp., at 340. We rejected this line of reasoning in *Jones* v. *North Carolina Prisoners' Labor Union,* 433 U. S., at 132–133, where we stated: "Responsible prison officials must be permitted to take reasonable steps to forestall . . . threat[s to security], and they must be permitted to act before the time when they can compile a dossier on the eve of a riot." We reject it again, now. In *Jones,* we also emphasized that the "informed discretion of prison officials that there is *potential* danger may be sufficient for limiting rights even though this showing might be 'unimpressive if . . . submitted as justification for governmental restriction of personal communication among members of the general public.'" (Emphasis added.) *Id.,* at 133 n. 9, quoting *Pell* v. *Procunier,* 417 U. S., at 825; see *Procunier* v. *Martinez,* 416 U. S., at 414.

available 'alternative means of [communication as] a relevant factor' in a case such as this where 'we [are] called upon to balance First Amendment rights against [legitimate] governmental . . . interests.'" *Id.*, at 824, quoting *Kleindienst* v. *Mandel*, 408 U. S. 753, 765 (1972); see *Cruz* v. *Beto*, 405 U. S., at 321, 322 n. 2. The restriction, as it is now before us, allows soft-bound books and magazines to be received from any source and hardback books to be received from publishers, bookstores, and book clubs. In addition, the MCC has a "relatively large" library for use by inmates. *United States ex rel. Wolfish* v. *United States*, 428 F. Supp., at 340.[33] To the limited extent the rule might possibly increase the cost of obtaining published materials, this Court has held that where "other avenues" remain available for the receipt of materials by inmates, the loss of "cost advantages does not fundamentally implicate *free speech* values." See *Jones* v. *North Carolina Prisoners' Labor Union*, *supra*, at 130–131. We are also influenced in our decision by the fact that the rule's impact on pretrial detainees is limited to a maximum period of approximately 60 days. See n. 3, *supra*. In sum, considering all the circumstances, we view the rule, as we now find it, to be a "reasonable 'time, place and manner' regulatio[n that is] necessary to further significant governmental interests . . . ." *Grayned* v. *City of Rockford*, 408 U. S. 104, 115 (1972); see *Cox* v. *New Hampshire*, 312 U. S. 569, 575–576 (1941); *Cox* v. *Louisiana*, 379 U. S. 536, 554–555 (1965); *Adderley* v. *Florida*, 385 U. S. 39, 46–48 (1966).

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[33] The general library consists of more than 3,000 hardback books, which include general reference texts and fiction and nonfiction works, and more than 5,000 assorted paperbacks, including fiction and nonfiction. The MCC offers for sale to inmates four daily newspapers and certain magazines. Joint App. in Nos. 77–2035, 77–2135 (CA2), pp. 102–103 (affidavit of Robert Harris, MCC Education Specialist, dated Oct. 19, 1976). Other paperback books and magazines are donated periodically and distributed among the units for inmate use. *United States ex rel. Wolfish* v. *Levi*, 439 F. Supp., at 131.

B

Inmates at the MCC were not permitted to receive packages from outside the facility containing items of food or personal property, except for one package of food at Christmas. This rule was justified by MCC officials on three grounds. First, officials testified to "serious" security problems that arise from the introduction of such packages into the institution, the "traditional file in the cake kind of situation" as well as the concealment of drugs "in heels of shoes [and] seams of clothing." App. 80; see *id.*, at 24, 84–85. As in the case of the "publisher-only" rule, the warden testified that if such packages were allowed, the inspection process necessary to ensure the security of the institution would require a "substantial and inordinate amount of available staff time." *Id.*, at 24. Second, officials were concerned that the introduction of personal property into the facility would increase the risk of thefts, gambling, and inmate conflicts, the "age-old problem of you have it and I don't." *Id.*, at 80; see *id.*, at 85. Finally, they noted storage and sanitary problems that would result from inmates' receipt of food packages. *Id.*, at 67, 80. Inmates are permitted, however, to purchase certain items of food and personal property from the MCC commissary.[34]

The District Court dismissed these justifications as "dire predictions." It was unconvinced by the asserted security problems because other institutions allow greater ownership of personal property and receipt of packages than does the MCC. And because the MCC permitted inmates to purchase items in the commissary, the court could not accept official fears of increased theft, gambling, or conflicts if packages were allowed. Finally, it believed that sanitation could be assured by proper housekeeping regulations. Accordingly, it ordered the MCC to promulgate regulations to permit receipt of at least items of the kind that are available in the commissary.

[34] Inmates are permitted to spend a total of $15 per week or up to $50 per month at the commissary. *Id.*, at 132.

439 F. Supp., at 152–153. The Court of Appeals accepted the District Court's analysis and affirmed, although it noted that the MCC could place a ceiling on the permissible dollar value of goods received and restrict the number of packages. 573 F. 2d, at 132.

Neither the District Court nor the Court of Appeals identified which provision of the Constitution was violated by this MCC restriction. We assume, for present purposes, that their decisions were based on the Due Process Clause of the Fifth Amendment, which provides protection for convicted prisoners and pretrial detainees alike against the deprivation of their property without due process of law. See *supra*, at 545. But as we have stated, these due process rights of prisoners and pretrial detainees are not absolute; they are subject to reasonable limitation or retraction in light of the legitimate security concerns of the institution.

We think that the District Court and the Court of Appeals have trenched too cavalierly into areas that are properly the concern of MCC officials. It is plain from their opinions that the lower courts simply disagreed with the judgment of MCC officials about the extent of the security interests affected and the means required to further those interests. But our decisions have time and again emphasized that this sort of unguided substitution of judicial judgment for that of the expert prison administrators on matters such as this is inappropriate. See *Jones* v. *North Carolina Prisoners' Labor Union; Pell* v. *Procunier; Procunier* v. *Martinez*. We do not doubt that the rule devised by the District Court and modified by the Court of Appeals may be a reasonable way of coping with the problems of security, order, and sanitation. It simply is not, however, the only constitutionally permissible approach to these problems. Certainly, the Due Process Clause does not mandate a "lowest common denominator" security standard, whereby a practice permitted at one penal institution must be permitted at all institutions.

Corrections officials concluded that permitting the introduction of packages of personal property and food would increase the risks of gambling, theft, and inmate fights over that which the institution already experienced by permitting certain items to be purchased from its commissary. "It is enough to say that they have not been conclusively shown to be wrong in this view." *Jones* v. *North Carolina Prisoners' Labor Union*, 433 U. S., at 132. It is also all too obvious that such packages are handy devices for the smuggling of contraband. There simply is no basis in this record for concluding that MCC officials have exaggerated their response to these serious problems or that this restriction is irrational. It does not therefore deprive the convicted inmates or pretrial detainees [35] of the MCC of their property without due process of law in contravention of the Fifth Amendment.

C

The MCC staff conducts unannounced searches of inmate living areas at irregular intervals. These searches generally are formal unit "shakedowns" during which all inmates are cleared of the residential units, and a team of guards searches each room. Prior to the District Court's order, inmates were not permitted to watch the searches. Officials testified that permitting inmates to observe room inspections would lead to friction between the inmates and security guards and would allow the inmates to attempt to frustrate the search by distracting personnel and moving contraband from one room to another ahead of the search team.[36]

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[35] With regard to pretrial detainees, we again note that this restriction affects them for generally a maximum of 60 days. See n. 3, *supra*.

[36] One of the correctional experts testified as follows:

"[T]he requirement that prisoners not be in the immediate area obviously has its basis again in the requirements of security.

"It is quite obvious that if a group of officers start a searching process of a housing area at the MCC, if it be a corridor or an area of rooms or in a

The District Court held that this procedure could not stand as applied to pretrial detainees because MCC officials had not shown that the restriction was justified by "compelling necessity." [37] The court stated that "[a]t least until or unless [petitioners] can show a pattern of violence or other disruptions taxing the powers of control—a kind of showing not remotely approached by the Warden's expressions—the security argument for banishing inmates while their rooms are searched must be rejected." 439 F. Supp., at 149. It also noted that in many instances inmates suspected guards of thievery. *Id.*, at 148–149. The Court of Appeals agreed with the District Court. It saw "no reason whatsoever not to permit a detainee to observe the search of his room and belongings from a reasonable distance," although the court permitted the removal of any detainee who became "obstructive." 573 F. 2d, at 132.

The Court of Appeals did not identify the constitutional provision on which it relied in invalidating the room-search rule. The District Court stated that the rule infringed the detainee's interest in privacy and indicated that this interest in privacy was founded on the Fourth Amendment. 439 F. Supp., at 149–150. It may well be argued that a person confined in a detention facility has no reasonable expectation of privacy with respect to his room or cell and that therefore the Fourth Amendment provides no protection for such a

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typical jail if it were a cell block, unless all prisoners are removed from that immediate area, there are a wide variety of opportunities for the confiscation of contraband by prisoners who may have such in their possession and cells.

"It can go down the toilet or out the window, swallowed, a wide variety of methods of confiscation of contraband." App. 78.

[37] The District Court did not extend its ruling to convicted inmates because, for them, "the asserted necessities need not be 'compelling,'" and since the warden's explanation of the problems posed was "certainly not weightless," the practice passed the constitutional test for sentenced inmates. 439 F. Supp., at 150.

person. Cf. *Lanza* v. *New York*, 370 U. S. 139, 143–144 (1962). In any case, given the realities of institutional confinement, any reasonable expectation of privacy that a detainee retained necessarily would be of a diminished scope. *Id.*, at 143. Assuming, *arguendo*, that a pretrial detainee retains such a diminished expectation of privacy after commitment to a custodial facility, we nonetheless find that the room-search rule does not violate the Fourth Amendment.

It is difficult to see how the detainee's interest in privacy is infringed by the room-search rule. No one can rationally doubt that room searches represent an appropriate security measure and neither the District Court nor the Court of Appeals prohibited such searches. And even the most zealous advocate of prisoners' rights would not suggest that a warrant is required to conduct such a search. Detainees' drawers, beds, and personal items may be searched, even after the lower courts' rulings. Permitting detainees to observe the searches does not lessen the invasion of their privacy; its only conceivable beneficial effect would be to prevent theft or misuse by those conducting the search. The room-search rule simply facilitates the safe and effective performance of the search which all concede may be conducted. The rule itself, then, does not render the searches "unreasonable" within the meaning of the Fourth Amendment.[38]

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[38] It may be that some guards have abused the trust reposed in them by failing to treat the personal possessions of inmates with appropriate respect. But, even assuming that in some instances these abuses of trust reached the level of constitutional violations, this is not an action to recover damages for damage to or destruction of particular items of property. This is a challenge to the room-search rule in its entirety, and the lower courts have enjoined enforcement of the practice itself. When analyzed in this context, proper deference to the informed discretion of prison authorities demands that they, and not the courts, make the difficult judgments which reconcile conflicting claims affecting the security of the institution, the welfare of the prison staff, and the property rights of the detainees. *Jones* v. *North Carolina Prisoners' Labor Union*, 433 U. S., at 128.

D

Inmates at all Bureau of Prisons facilities, including the MCC, are required to expose their body cavities for visual inspection as a part of a strip search conducted after every contact visit with a person from outside the institution.[39] Corrections officials testified that visual cavity searches were necessary not only to discover but also to deter the smuggling of weapons, drugs, and other contraband into the institution. App. 70–72, 83–84. The District Court upheld the strip-search procedure but prohibited the body-cavity searches, absent probable cause to believe that the inmate is concealing contraband. 439 F. Supp., at 147–148. Because petitioners proved only one instance in the MCC's short history where contraband was found during a body-cavity search, the Court of Appeals affirmed. In its view, the "gross violation of personal privacy inherent in such a search cannot be outweighed by the government's security interest in maintaining a practice of so little actual utility." 573 F. 2d, at 131.

Admittedly, this practice instinctively gives us the most pause. However, assuming for present purposes that inmates, both convicted prisoners and pretrial detainees, retain some Fourth Amendment rights upon commitment to a corrections facility, see *Lanza* v. *New York, supra; Stroud* v. *United States,* 251 U. S. 15, 21 (1919), we nonetheless conclude that these searches do not violate that Amendment. The Fourth Amendment prohibits only unreasonable searches, *Carroll* v. *United States,* 267 U. S. 132, 147 (1925), and under the circumstances, we do not believe that these searches are unreasonable.

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[39] If the inmate is a male, he must lift his genitals and bend over to spread his buttocks for visual inspection. The vaginal and anal cavities of female inmates also are visually inspected. The inmate is not touched by security personnel at any time during the *visual* search procedure. 573 F. 2d, at 131; Brief for Petitioners 70, 74 n. 56.

The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted. *E. g., United States* v. *Ramsey,* 431 U. S. 606 (1977); *United States* v. *Martinez-Fuerte,* 428 U. S. 543 (1976); *United States* v. *Brignoni-Ponce,* 422 U. S. 873 (1975); *Terry* v. *Ohio,* 392 U. S. 1 (1968); *Katz* v. *United States,* 389 U. S. 347 (1967); *Schmerber* v. *California,* 384 U. S. 757 (1966). A detention facility is a unique place fraught with serious security dangers. Smuggling of money, drugs, weapons, and other contraband is all too common an occurrence. And inmate attempts to secrete these items into the facility by concealing them in body cavities are documented in this record, App. 71–76, and in other cases. *E. g., Ferraro* v. *United States,* 590 F. 2d 335 (CA6 1978); *United States* v. *Park,* 521 F. 2d 1381, 1382 (CA9 1975). That there has been only one instance where an MCC inmate was discovered attempting to smuggle contraband into the institution on his person may be more a testament to the effectiveness of this search technique as a deterrent than to any lack of interest on the part of the inmates to secrete and import such items when the opportunity arises.[40]

[40] The District Court indicated that in its view the use of metal detection equipment represented a less intrusive and equally effective alternative to cavity inspections. We noted in *United States* v. *Martinez-Fuerte,* 428 U. S. 543, 556–557, n. 12 (1976), that "[t]he logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers." However, assuming that the existence of less intrusive alternatives is relevant to the determination of the reasonableness of the particular search method at issue, the alternative suggested by the District Court simply would not be as effective as the visual inspection procedure. Money, drugs, and other non-

We do not underestimate the degree to which these searches may invade the personal privacy of inmates. Nor do we doubt, as the District Court noted, that on occasion a security guard may conduct the search in an abusive fashion. 439 F. Supp., at 147. Such abuse cannot be condoned. The searches must be conducted in a reasonable manner. *Schmerber* v. *California, supra,* at 771–772. But we deal here with the question whether visual body-cavity inspections as contemplated by the MCC rules can *ever* be conducted on less than probable cause. Balancing the significant and legitimate security interests of the institution against the privacy interests of the inmates, we conclude that they can.[41]

IV

Nor do we think that the four MCC security restrictions and practices described in Part III, *supra,* constitute "punish-

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metallic contraband still could easily be smuggled into the institution. Another possible alternative, not mentioned by the lower courts, would be to closely observe inmate visits. See Dept. of Justice, Federal Corrections Policy Task Force, Federal Standards for Corrections (Draft, June 1978). But MCC officials have adopted the visual inspection procedure as an alternative to close and constant monitoring of contact visits to avoid the obvious disruption of the confidentiality and intimacy that these visits are intended to afford. That choice has not been shown to be irrational or unreasonable. Another alternative that might obviate the need for body-cavity inspections would be to abolish contact visits altogether. But the Court of Appeals, in a ruling that is not challenged in this Court and on which we, accordingly, express no opinion, held that pretrial detainees have a constitutional right to contact visits. 573 F. 2d, at 126 n. 16; see *Marcera* v. *Chinlund,* 595 F. 2d 1231 (CA2 1979). See also *Miller* v. *Carson,* 563 F. 2d, at 748–749.

[41] We note that several lower courts have upheld such visual body-cavity inspections against constitutional challenge. See, *e. g., Daughtery* v. *Harris,* 476 F. 2d 292 (CA10), cert. denied, 414 U. S. 872 (1973); *Hodges* v. *Klein,* 412 F. Supp. 896 (NJ 1976); *Bijeol* v. *Benson,* 404 F. Supp. 595 (SD Ind. 1975); *Penn El* v. *Riddle,* 399 F. Supp. 1059 (ED Va. 1975).

ment" in violation of the rights of pretrial detainees under the Due Process Clause of the Fifth Amendment.[42] Neither the District Court nor the Court of Appeals suggested that these restrictions and practices were employed by MCC officials with an intent to punish the pretrial detainees housed there.[43] Respondents do not even make such a suggestion; they simply argue that the restrictions were greater than necessary to satisfy petitioners' legitimate interest in maintaining security. Brief for Respondents 51–53. Therefore, the determination whether these restrictions and practices constitute punishment in the constitutional sense depends on whether they are rationally related to a legitimate nonpunitive governmental purpose and whether they appear excessive in relation to that purpose. See *supra*, at 538–539. Ensuring security and order at the institution is a permissible nonpunitive objective, whether the facility houses pretrial detainees, convicted inmates, or both. *Supra*, at 539–540; see *supra*, at 546–547, and n. 28. For the reasons set forth in Part III, *supra*, we think that these particular restrictions and practices were reasonable responses by MCC officials to legitimate security concerns. Respondents simply have not met their heavy

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[42] In determining whether the "publisher-only" rule constitutes punishment, we consider the rule in its present form and in light of the concessions made by petitioners. See *supra*, at 548–550.

[43] The District Court noted that in their post-trial memorandum petitioners stated that "[w]ith respect to sentenced inmates, . . . the restrictions on the possession of personal property also serve the legitimate purpose of punishment." 439 F. Supp., at 153; see Post-trial Memorandom for Respondents in No. 75 Civ. 6000 (SDNY) 212 n. However, below and in this Court, petitioners have relied only on the three reasons discussed *supra*, at 553, to justify this restriction. In our view, this passing reference in a brief to sentenced inmates, which was not supported by citation to the record, hardly amounts to the "substantial confession of error" with respect to pretrial detainees referred to by the District Court. 439 F. Supp., at 153.

burden of showing that these officials have exaggerated their response to the genuine security considerations that actuated these restrictions and practices. See n. 23, *supra*. And as might be expected of restrictions applicable to pretrial detainees, these restrictions were of only limited duration so far as the MCC pretrial detainees were concerned. See n. 3, *supra*.

V

There was a time not too long ago when the federal judiciary took a completely "hands-off" approach to the problem of prison administration. In recent years, however, these courts largely have discarded this "hands-off" attitude and have waded into this complex arena. The deplorable conditions and Draconian restrictions of some of our Nation's prisons are too well known to require recounting here, and the federal courts rightly have condemned these sordid aspects of our prison systems. But many of these same courts have, in the name of the Constitution, become increasingly enmeshed in the minutiae of prison operations. Judges, after all, are human. They, no less than others in our society, have a natural tendency to believe that their individual solutions to often intractable problems are better and more workable than those of the persons who are actually charged with and trained in the running of the particular institution under examination. But under the Constitution, the first question to be answered is not whose plan is best, but in what branch of the Government is lodged the authority to initially devise the plan. This does not mean that constitutional rights are not to be scrupulously observed. It does mean, however, that the inquiry of federal courts into prison management must be limited to the issue of whether a particular system violates any prohibition of the Constitution or, in the case of a federal prison, a statute. The wide range of "judgment calls" that meet constitutional and statutory requirements are confided to officials outside of the Judicial Branch of Government.

The judgment of the Court of Appeals is, accordingly, reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE POWELL, concurring in part and dissenting in part.

I join the opinion of the Court except the discussion and holding with respect to body-cavity searches. In view of the serious intrusion on one's privacy occasioned by such a search, I think at least some level of cause, such as a reasonable suspicion, should be required to justify the anal and genital searches described in this case. I therefore dissent on this issue.

MR. JUSTICE MARSHALL, dissenting.

The Court holds that the Government may burden pretrial detainees with almost any restriction, provided detention officials do not proclaim a punitive intent or impose conditions that are "arbitrary or purposeless." *Ante*, at 539. As if this standard were not sufficiently ineffectual, the Court dilutes it further by according virtually unlimited deference to detention officials' justifications for particular impositions. Conspicuously lacking from this analysis is any meaningful consideration of the most relevant factor, the impact that restrictions may have on inmates. Such an approach is unsupportable, given that all of these detainees are presumptively innocent and many are confined solely because they cannot afford bail.[1]

[1] The Bail Reform Act, 18 U. S. C. § 3146, to which the Court adverts *ante*, at 524, provides that bail be set in an amount that will "reasonably assure" the defendant's presence at trial. In fact, studies indicate that bail determinations frequently do not focus on the individual defendant but only on the nature of the crime charged and that, as administered, the system penalizes indigent defendants. See, *e. g.*, ABA Project on Standards for Criminal Justice, Pretrial Release 1–2 (1968); W. Thomas,

In my view, the Court's holding departs from the precedent it purports to follow and precludes effective judicial review of the conditions of pretrial confinement. More fundamentally, I believe the proper inquiry in this context is not whether a particular restraint can be labeled "punishment." Rather, as with other due process challenges, the inquiry should be whether the governmental interests served by any given restriction outweigh the individual deprivations suffered.

I

The premise of the Court's anlaysis is that detainees, unlike prisoners, may not be "punished." To determine when a particular disability imposed during pretrial detention is punishment, the Court invokes the factors enunciated in *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 168–169 (1963), quoted *ante*, at 537–538 (footnotes omitted):

> "Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions."

A number of the factors enunciated above focus on the nature and severity of the impositions at issue. Thus, if weight were given to all its elements, I believe the *Mendoza-Martinez* inquiry could be responsive to the impact of the

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Bail Reform in America 11–19 (1976). See also National Advisory Commission on Criminal Justice Standards and Goals, Corrections 102–103 (1973); National Association of Pretrial Service Agencies, Performance Standards and Goals for Pretrial Release and Diversion 1–3 (1978).

deprivations imposed on detainees. However, within a few lines after quoting *Mendoza-Martinez,* the Court restates the standard as whether there is an expressed punitive intent on the part of detention officials, and, if not, whether the restriction is rationally related to some nonpunitive purpose or appears excessive in relation to that purpose. *Ante,* at 538–539. Absent from the reformulation is any appraisal of whether the sanction constitutes an affirmative disability or restraint and whether it has historically been regarded as punishment. Moreover, when the Court applies this standard, it loses interest in the inquiry concerning excessiveness, and, indeed, eschews consideration of less restrictive alternatives, practices in other detention facilities, and the recommendations of the Justice Department and professional organizations. See *ante,* at 542–543, n. 25, 543–544, n. 27, 554. By this process of elimination, the Court contracts a broad standard, sensitive to the deprivations imposed on detainees, into one that seeks merely to sanitize official motives and prohibit irrational behavior. As thus reformulated, the test lacks any real content.

A

To make detention officials' intent the critical factor in assessing the constitutionality of impositions on detainees is unrealistic in the extreme. The cases on which the Court relies to justify this narrow focus all involve legislative Acts, not day-to-day administrative decisions. See *Kennedy* v. *Mendoza-Martinez, supra* (Nationality Act of 1940 and Immigration and Nationality Act of 1952); *Flemming* v. *Nestor,* 363 U. S. 603 (1960) (Social Security Act); *De Veau* v. *Braisted,* 363 U. S. 144 (1960) (New York Waterfront Commission Act). In discerning the intent behind a statutory enactment, courts engage in a familiar judicial function, usually with the benefit of a legislative history that preceded passage of the statute. The motivation for policies in detention facilities, however, will frequently not be a matter of pub-

lic record. Detainees challenging these policies will therefore bear the substantial burden of establishing punitive intent on the basis of circumstantial evidence or retrospective explanations by detention officials, which frequently may be self-serving. Particularly since the Court seems unwilling to look behind any justification based on security,[2] that burden will usually prove insurmountable.

In any event, it will often be the case that officials believe, erroneously but in good faith, that a specific restriction is necessary for institutional security. As the District Court noted, "zeal for security is among the most common varieties of official excess," *United States ex rel. Wolfish* v. *Levi*, 439 F. Supp. 114, 141 (SDNY 1977), and the litigation in this area corroborates that conclusion.[3] A standard that focuses

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[2] Indeed, the Court glosses over the Government's statement in its post-trial memorandum that for inmates serving sentences, "the restrictions on the possession of personal property also serve the legitimate purpose of punishment." *United States ex rel. Wolfish* v. *Levi*, 439 F. Supp. 114, 153 (SDNY 1977); Post-trial Memorandum for Respondents in No. 75 Civ. 6000 (SDNY) 212 n., quoted *ante*, at 561 n. 43. This statement provides at least some indication that a similar motive may underlie application of the same rules to detainees. The Court's treatment of this point illustrates the indifference with which it pursues the intent inquiry.

[3] Thus, for example, lower courts have held a variety of security restrictions unconstitutional. *E. g.*, *Collins* v. *Schoonfield*, 344 F. Supp. 257, 283 (Md. 1972) (warden censored newspaper articles critical of his administration of jail); *id.*, at 278 (mentally disturbed detainees shackled in jail infirmary); *Inmates of Milwaukee County Jail* v. *Petersen*, 353 F. Supp. 1157, 1164 (ED Wis. 1973) (detainees limited to two pages per letter; notice to relatives and friends of the time and place of detainee's next court appearance deleted on security grounds); *United States ex rel. Manicone* v. *Corso*, 365 F. Supp. 576 (EDNY 1973) (newspapers banned because they might disrupt prisoners and create a fire hazard); *Miller* v. *Carson*, 401 F. Supp. 835, 878 (MD Fla. 1975), aff'd, 563 F. 2d 741 (CA5 1977) (detainees in hospital kept continuously chained to bed); *O'Bryan* v. *County of Saginaw*, 437 F. Supp. 582 (ED Mich. 1977) (detainees with bail of more than $500 prevented from attending religious services); *Vest* v. *Lubbock County Commissioners Court*, 444 F. Supp. 824 (ND Tex.

on punitive intent cannot effectively eliminate this excess. Indeed, the Court does not even attempt to "detail the precise extent of the legitimate governmental interests that may justify conditions or restrictions of pretrial detention." *Ante,* at 540. Rather, it is content merely to recognize that "the effective management of the detention facility . . . is a valid objective that may justify imposition of conditions and restrictions of pretrial detention and dispel any inference that such restrictions are intended as punishment." *Ibid.*

Moreover, even if the inquiry the Court pursues were more productive, it simply is not the one the Constitution mandates here. By its terms, the Due Process Clause focuses on the nature of deprivations, not on the persons inflicting them. If this concern is to be vindicated, it is the effect of conditions of confinement, not the intent behind them, that must be the focal point of constitutional analysis.

B

Although the Court professes to go beyond the direct inquiry regarding intent and to determine whether a particular imposition is rationally related to a nonpunitive purpose, this exercise is at best a formality. Almost any restriction on detainees, including, as the Court concedes, chains and shackles, *ante,* at 539 n. 20, can be found to have some rational relation to institutional security, or more broadly, to "the effective management of the detention facility." *Ante,* at 540. See *Feeley* v. *Sampson,* 570 F. 2d 364, 380 (CA1 1977) (Coffin, C. J., dissenting). Yet this toothless standard applies irrespective of the excessiveness of the restraint or the nature of the rights infringed.[4]

1977) (detainees limited to three pages per letter and six incoming and outgoing letters per week to facilitate censorship; guards authorized to refuse to mail or deliver letters containing "abusive" language).

[4] The Court does concede that "loading a detainee with chains and shackles and throwing him in a dungeon," *ante,* at 539 n. 20, would create

Moreover, the Court has not in fact reviewed the rationality of detention officials' decisions, as *Mendoza-Martinez* requires. Instead, the majority affords "wide-ranging" deference to those officials "in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Ante*, at 547.[5] Reasoning that security considerations in jails are little different than in prisons, the Court concludes that cases requiring substantial deference to *prison* administrators' determinations on security-related issues are equally applicable in the present context. *Ante*, at 546–547, nn. 28, 29.

Yet as the Court implicitly acknowledges, *ante*, at 545, the rights of detainees, who have not been adjudicated guilty of a crime, are necessarily more extensive than those of prisoners "who have been found to have violated one or more of the criminal laws established by society for its orderly governance." *Jones* v. *North Carolina Prisoners' Union*, 433 U. S. 119, 129 (1977). See *Campbell* v. *McGruder*, 188 U. S. App. D. C. 258, 264 n. 9, 580 F. 2d 521, 527 n. 9 (1978). Judicial tolerance of substantial impositions on detainees must be concomitantly less. However, by blindly deferring to administrative judgments on the rational basis for particular restrictions, the Court effectively delegates to detention officials the decision whether pretrial detainees have been punished. This, in my view, is an abdication of an unquestionably judicial function.

II

Even had the Court properly applied the punishment test, I could not agree to its use in this context. It simply does

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an inference of punitive intent and hence would be impermissible. I am indeed heartened by this concession, but I do not think it sufficient to give force to the Court's standard.

[5] Indeed, lest the point escape the reader, the majority reiterates it 12 times in the course of the opinion. *Ante*, at 531, 540–541, n. 23, 544, 546–548, and nn. 29 and 30, 551, 554, 557 n. 38, 562.

not advance analysis to determine whether a given deprivation imposed on detainees constitutes "punishment." For in terms of the nature of the imposition and the impact on detainees, pretrial incarceration, although necessary to secure defendants' presence at trial, is essentially indistinguishable from punishment.[6] The detainee is involuntarily confined and deprived of the freedom "to be with his family and friends and to form the other enduring attachments of normal life," *Morrissey* v. *Brewer*, 408 U. S. 471, 482 (1972). Indeed, this Court has previously recognized that incarceration is an "infamous punishment." *Flemming* v. *Nestor*, 363 U. S., at 617; see also *Wong Wing* v. *United States*, 163 U. S. 228, 233–234 (1896); *Ingraham* v. *Wright*, 430 U. S. 651, 669 (1977). And if the effect of incarceration itself is inevitably punitive, so too must be the cumulative impact of those restraints incident to that restraint.[7]

A test that balances the deprivations involved against the state interests assertedly served[8] would be more consistent

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[6] As Chief Judge Coffin has stated, "[i]t would be impossible, without playing fast and loose with the English language, for a court to examine the conditions of confinement under which detainees are incarcerated . . . and conclude that their custody was not punitive in effect if not in intent." *Feeley* v. *Sampson*, 570 F. 2d 364, 380 (CA1 1978) (dissenting opinion). Accord, *Campbell* v. *McGruder*, 188 U. S. App. D. C. 258, 267, 580 F. 2d 521, 530 (1978).

[7] If a particular imposition could be termed "punishment" under the *Mendoza-Martinez* criteria, I would, of course, agree that it violates the Due Process Clause. My criticism is that, in this context, determining whether a given restraint constitutes punishment is an empty semantic exercise. For pretrial incarceration is in many respects no different from the sanctions society imposes on convicted criminals. To argue over a question of characterization can only obscure what is in fact the appropriate inquiry, the actual nature of the impositions balanced against the Government's justifications.

[8] See *New Motor Vehicle Board* v. *Orrin W. Fox Co.*, 439 U. S. 96, 112–113 (1978) (MARSHALL, J., concurring); *Poe* v. *Ullman*, 367 U. S. 497, 542 (1961) (Harlan, J., dissenting); *Moore* v. *East Cleveland*, 431 U. S. 494, 499 (1977); *Roe* v. *Wade*, 410 U. S. 113, 115 (1973).

with the import of the Due Process Clause. Such an approach would be sensitive to the tangible physical and psychological harm that a particular disability inflicts on detainees and to the nature of the less tangible, but significant, individual interests at stake. The greater the imposition on detainees, the heavier the burden of justification the Government would bear. See *Bates* v. *Little Rock*, 361 U. S. 516, 524 (1960); *Shapiro* v. *Thompson*, 394 U. S. 618, 634 (1969); *Kusper* v. *Pontikes*, 414 U. S. 51, 58–59 (1973).

When assessing the restrictions on detainees, we must consider the cumulative impact of restraints imposed during confinement. Incarceration of itself clearly represents a profound infringement of liberty, and each additional imposition increases the severity of that initial deprivation. Since any restraint thus has a serious effect on detainees, I believe the Government must bear a more rigorous burden of justification than the rational-basis standard mandates. See *supra*, at 567. At a minimum, I would require a showing that a restriction is substantially necessary to jail administration. Where the imposition is of particular gravity, that is, where it implicates interests of fundamental importance [9] or inflicts significant harms, the Government should demonstrate that the restriction serves a compelling necessity of jail administration.[10]

In presenting its justifications, the Government could adduce evidence of the security and administrative needs of

[9] See, *e. g.*, *Brandenburg* v. *Ohio*, 395 U. S. 444, 448 (1969) (free speech); *Bounds* v. *Smith*, 430 U. S. 817 (1977) (access to the courts).

[10] Blackstone observed over 200 years ago:

"Upon the whole, if the offence be not bailable, or the party cannot find bail, he is to be committed to the county gaol by the *mittimus* of the justice . . . ; there to abide till delivered by due course of law. . . . But this imprisonment, as has been said, is only for safe custody, and not for punishment: therefore, in his dubious interval between the commitment and trial, a prisoner ought to be used with the utmost humanity; and neither be loaded with needless fetters, or subjected to other hardships than such as are absolutely requisite for the purpose of confinement only . . . ." 4 W. Blackstone, Commentaries *300.

the institution as well as the fiscal constraints under which it operates. And, of course, considerations of competence and comity require some measure of deference to the judgments of detention officials. Their estimation of institutional needs and the administrative consequences of particular acts is entitled to weight. But as the Court has repeatedly held in the prison context, judicial restraint "cannot encompass any failure to take cognizance of valid constitutional claims." *Procunier* v. *Martinez,* 416 U. S. 396, 405 (1974); *Bounds* v. *Smith,* 430 U. S. 817, 832 (1977). Even more so here, with the rights of presumptively innocent individuals at stake, we cannot abdicate our judicial responsibility to evaluate independently the Government's asserted justifications for particular deprivations. In undertaking this evaluation, courts should thus examine evidence of practices in other detention and penal facilities. To be sure, conditions of detention should not survive constitutional challenge merely because they are no worse than circumstances in prisons. But this evidence can assist courts in evaluating justifications based on security, administrative convenience, and fiscal constraints.

Simply stated, the approach I advocate here weighs the detainees' interests implicated by a particular restriction against the governmental interests the restriction serves. As the substantiality of the intrusion on detainees' rights increases, so must the significance of the countervailing governmental objectives.

III

A

Applying this standard to the facts of this case, I believe a remand is necessary on the issue of double-bunking at the MCC. The courts below determined only whether double-bunking was justified by a compelling necessity, excluding fiscal and administrative considerations. Since it was readily ascertainable that the Government could not prevail under that test, detailed inquiry was unnecessary. Thus, the Dis-

trict Court granted summary judgment, without a full record on the psychological and physical harms caused by overcrowding.[11] To conclude, as the Court does here, that double-bunking has not inflicted "genuine privations and hardship over an extended period of time," *ante*, at 542, is inappropriate where respondents have not had an adequate opportunity to produce evidence suggesting otherwise. Moreover, that the District Court discerned no disputed issues of material fact, see *ante*, at 541 n. 24, is no justification for avoiding a remand, since what is material necessarily varies with the standard applied. Rather than pronouncing overbroad aphorisms about the principles "lurking in the Due Process Clause," *ante*, at 542, I would leave to the District Court in the first instance the sensitive balancing inquiry that the Due Process Clause dictates.[12]

B

Although the constitutionality of the MCC's rule limiting the sources of hardback books was also decided on summary judgment, I believe a remand is unnecessary.[13] That

[11] Other courts have found that in the circumstances before them overcrowding inflicted mental and physical damage on inmates. See, *e. g.*, *Detainees of Brooklyn House of Detention* v. *Malcolm*, 520 F. 2d 392, 396, and n. 4 (CA2 1975) (testimony of correctional experts that double-bunking is "psychologically destructive and increases homosexual impulses, tensions and aggressive tendencies"); *Battle* v. *Anderson*, 564 F. 2d 388, 398 (CA10 1977); *Campbell* v. *McGruder*, 188 U. S. App. D. C., at 273, 580 F. 2d, at 536 (overcrowding likely "to impair the mental and physical health" of detainees); *Chapman* v. *Rhodes*, 434 F. Supp. 1007, 1020 (SD Ohio 1977).

[12] The MCC has a single-bed capacity of 449 inmates. Under the Court's analysis, what is to be done if the inmate population grows suddently to 600, or 900? The Court simply ignores the rated capacity of the institution. Yet this figure is surely relevant in assessing whether overcrowding inflicts harms of constitutional magnitude.

[13] The Court of Appeals' rulings on what this Court broadly designates "security restrictions" applied both to detainees and convicted prisoners. I believe impositions on these groups must be measured under different standards. See *supra*, at 568–571. I would remand to the District Court

individuals have a fundamental First Amendment right to receive information and ideas is beyond dispute. See *Martin* v. *Struthers*, 319 U. S. 141, 143 (1943); *Stanley* v. *Georgia*, 394 U. S. 557, 565 (1969); *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 390 (1969); see also *Brandenburg* v. *Ohio*, 395 U. S. 444, 448 (1969). Under the balancing test elaborated above, the Government must therefore demonstrate that its rule infringing on that interest serves a compelling necessity. As the courts below found, the Government failed to make such a showing.[14]

In support of its restriction, the Government presented the affidavit of the MCC warden, who averred without elaboration that a proper and thorough search of incoming hardback books might require removal of the covers. Further, the warden asserted, "in the case of all books and magazines," it would

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for a determination whether there is a continuing controversy with respect to convicted inmates. If the issues were contested, the body-cavity searches, at the least, would presumably be invalid. Cf. *infra*, at 576–578, and *United States* v. *Lilly*, 576 F. 2d 1240 (CA5 1978).

[14] Nor can the Court's attempt to denominate the publisher-only rule as a reasonable "time, place and manner regulatio[n]," *ante*, at 552, substitute for such a showing. In each of the cases cited by the Court for this proposition, the private individuals had the ability to alter the time, place, or manner of exercising their First Amendment rights. *Grayned* v. *City of Rockford*, 408 U. S. 104 (1972) (ordinance prohibiting demonstration within 150 feet of a school at certain times of the day); *Cox* v. *New Hampshire*, 312 U. S. 569 (1941) (permissible to require license for parade); *Cox* v. *Louisiana*, 379 U. S. 536, 554–555 (1965) (city could prohibit parades during rush hour); *Adderley* v. *Florida*, 385 U. S. 39 (1966) (public demonstration on premises of county jail). It is not clear that the detainees here possess the same freedom to alter the time, place, or manner of exercising their First Amendment rights. Indeed, as the Government acknowledges, Tr. of Oral Arg. 18, an unspecified number of detainees at the MCC are incarcerated because they cannot afford bail. For these persons, the option of purchasing hardback books from publishers or bookstores will frequently be unavailable. And it is hardly consistent with established First Amendment precepts to restrict inmates to library selections made by detention officials.

be necessary to leaf through every page to ascertain that there was no contraband. App. 24. The warden offered no reasons why the institution could not place reasonable limitations on the number of books inmates could receive or use electronic devices and fluoroscopes to detect contraband rather than requiring inmates to purchase hardback books directly from publishers or stores.[15] As the Court of Appeals noted, "other institutions have not recorded untoward experiences with far less restrictive rules." *Wolfish* v. *Levi*, 573 F. 2d 118, 130 (1978).

The limitation on receipt of hardback books may well be *one* rational response to the legitimate security concerns of the institution, concerns which I in no way intend to deprecate. But our precedents, as the courts below apparently recognized, *United States ex rel. Wolfish* v. *United States*, 428 F. Supp. 333, 341 (SDNY 1977); 573 F. 2d, at 130, require some consideration of less restrictive alternatives, see, *e. g.*, *Shelton* v. *Tucker*, 364 U. S. 479, 488–490 (1960); *Keyishian* v. *Board of Regents*, 385 U. S. 589, 602–604 (1967). There is no basis for relaxing this requirement when the rights of presumptively innocent detainees are implicated.

C

The District Court did conduct a trial on the constitutionality of the MCC package rule and room-search practices. Although the courts below applied a different standard, the record is sufficient to permit resolution of these issues here. And since this Court decides the questions, I think it appropriate to suggest the results that would obtain on this record under my standard.

Denial of the right to possess property is surely of heightened concern when viewed with the other indignities of detainment. See App. 73. As the District Court observed, it is a

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[15] The MCC already uses such electronic equipment to search packages carried by visitors. See *infra*, at 578.

severe discomfort to do without personal items such as a watch or cosmetics, and things to eat, smoke, or chew. Indeed, the court noted, "[t]he strong dependence upon material things . . . gives rise to one of the deepest miseries of incarceration—the deprivation of familiar possessions." 439 F. Supp., at 150. Given this impact on detainees, the appropriate inquiry is whether the package restriction is substantially necessary to prison administration.

The Government's justification for such a broad rule cannot meet this burden. The asserted interest in ameliorating sanitation and storage problems and avoiding thefts, gambling, and inmate conflicts over personal property is belied, as the Court seems to recognize, *ante*, at 553, by the policy of permitting inmate purchases of up to $15 a week from the prison commissary. Detention officials doubtless have a legitimate interest in preventing introduction of drugs or weapons into the facility. But as both the District Court and the Court of Appeals observed, other detention institutions have adopted much less restrictive regulations than the MCC's governing receipt of packages. See, *e. g.*, *Miller* v. *Carson*, 401 F. Supp. 835, 885 (MD Fla. 1975), aff'd, 563 F. 2d 741 (CA5 1977); *Giampetruzzi* v. *Malcolm*, 406 F. Supp. 836, 842 (SDNY 1975). Inmates in New York state institutions, for example, may receive a 35-pound package each month, as well as clothing and magazines. See 439 F. Supp., at 152.[16]

To be sure, practices in other institutions do not necessarily demarcate the constitutional minimum. See *ante*, at 554. But such evidence does cast doubt upon the Government's justifications based on institutional security and administrative convenience. The District Court held that the Government was obligated to dispel these doubts. The court thus

[16] In addition, the Justice Department's Draft Federal Standards for Corrections discourage limitations on the volume or content of inmate mail, including packages. Dept. of Justice, Federal Corrections Policy Task Force, Federal Standards for Corrections 63 (Draft, June 1978).

required a reasoned showing why "there must be deprivations at the MCC so much harsher than deemed necessary in other institutions." 439 F. Supp., at 152. Absent such a showing, the court concluded that the MCC's rule swept too broadly and ordered detention officials to formulate a suitable alternative, at least with respect to items available from the commissary. *Id.*, at 153. This holding seems an appropriate accommodation of the competing interests and a minimal intrusion on administrative prerogatives.

I would also affirm the ruling of the courts below that inmates must be permitted to observe searches of their cells. Routine searches such as those at issue here may be an unavoidable incident of incarceration. Nonetheless, the protections of the Fourth Amendment do not lapse at the jailhouse door, *Bonner* v. *Coughlin*, 517 F. 2d 1311, 1316–1317 (CA7 1975) (Stevens, J.); *United States* v. *Lilly*, 576 F. 2d 1240, 1244–1245 (CA5 1978). Detention officials must therefore conduct such searches in a reasonable manner, avoiding needless intrusions on inmates' privacy. Because unobserved searches may invite official disrespect for detainees' few possessions and generate fears that guards will steal personal property or plant contraband, see 439 F. Supp., at 148–149, the inmates' interests are significant.

The Government argues that allowing detainees to observe official searches would lead to violent confrontations and enable inmates to remove or conceal contraband. However, the District Court found that the Government had not substantiated these security concerns and that there were less intrusive means available to accomplish the institution's objectives. *Ibid.* Thus, this record does not establish that unobserved searches are substantially necessary to jail administration.

D

In my view, the body-cavity searches of MCC inmates represent one of the most grievous offenses against personal

dignity and common decency. After every contact visit with someone from outside the facility, including defense attorneys, an inmate must remove all of his or her clothing, bend over, spread the buttocks, and display the anal cavity for inspection by a correctional officer. Women inmates must assume a suitable posture for vaginal inspection, while men must raise their genitals. And, as the Court neglects to note, because of time pressures, this humiliating spectacle is frequently conducted in the presence of other inmates. App. 77.

The District Court found that the stripping was "unpleasant, embarrassing, and humiliating." 439 F. Supp., at 146. A psychiatrist testified that the practice placed inmates in the most degrading position possible, App. 48, a conclusion amply corroborated by the testimony of the inmates themselves. *Id.*, at 36–37, 41.[17] There was evidence, moreover, that these searches engendered among detainees fears of sexual assault, *id.*, at 49, were the occasion for actual threats of physical abuse by guards, and caused some inmates to forgo personal visits. 439 F. Supp., at 147.

Not surprisingly, the Government asserts a security justification for such inspections. These searches are necessary, it argues, to prevent inmates from smuggling contraband into the facility. In crediting this justification despite the contrary findings of the two courts below, the Court overlooks the critical facts. As respondents point out, inmates are required to wear one-piece jumpsuits with zippers in the front. To insert an object into the vaginal or anal cavity, an inmate would have to remove the jumpsuit, at least from the upper torso. App. 45; Joint App. in Nos. 77–2035, 77–2135 (CA2),

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[17] While the Government presented psychiatric testimony that the procedures were not likely to create lasting emotional trauma, the District Court intimated some doubt as to the credibility of this testimony, and found that the injury was of constitutional dimension even if it did not require psychiatric treatment or leave permanent psychological scars. 439 F. Supp., at 150.

p. 925 (hereinafter Joint App.). Since contact visits occur in a glass-enclosed room and are continuously monitored by corrections officers, see 439 F. Supp., at 140, 147; Joint App. 144, 1208–1209,[18] such a feat would seem extraordinarily difficult. There was medical testimony, moreover, that inserting an object into the rectum is painful and "would require time and opportunity which is not available in the visiting areas," App. 49–50, and that visual inspection would probably not detect an object once inserted. *Id.*, at 50. Additionally, before entering the visiting room, visitors and their packages are searched thoroughly by a metal detector, fluoroscope, and by hand. *Id.*, at 93; Joint App. 601, 1077. Correction officers may require that visitors leave packages or handbags with guards until the visit is over. Joint App. 1077–1078. Only by blinding itself to the facts presented on this record can the Court accept the Government's security rationale.

Without question, these searches are an imposition of sufficient gravity to invoke the compelling-necessity standard. It is equally indisputable that they cannot meet that standard. Indeed, the procedure is so unnecessarily degrading that it "shocks the conscience." *Rochin* v. *California*, 342 U. S. 165, 172 (1952). Even in *Rochin*, the police had reason to believe that the petitioner had swallowed contraband. Here, the searches are employed absent any suspicion of wrongdoing. It was this aspect of the MCC practice that the Court of Appeals redressed, requiring that searches be conducted only when there is probable cause to believe that the inmate is concealing contraband. The Due Process Clause, on any principled reading, dictates no less.

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[18] To facilitate this monitoring, MCC officials limited to 25 the number of people in the visiting room at one time. Joint App. 1208. Inmates were forbidden to use the locked lavatories, and visitors could use them only by requesting a key from a correctional officer. App. 93; see *Wolfish* v. *Levi*, 573 F. 2d 118, 125 (1978). The lavatories, as well, contain a built-in window for observation. Brief for Respondents 57.

That the Court can uphold these indiscriminate searches highlights the bankruptcy of its basic analysis. Under the test adopted today, the rights of detainees apparently extend only so far as detention officials decide that cost and security will permit. Such unthinking deference to administrative convenience cannot be justified where the interests at stake are those of presumptively innocent individuals, many of whose only proven offense is the inability to afford bail. I dissent.

MR. JUSTICE STEVENS, with whom MR. JUSTICE BRENNAN joins, dissenting.

This is not an equal protection case.[1] An empirical judgment that most persons formally accused of criminal conduct are probably guilty would provide a rational basis for a set of rules that treat them like convicts until they establish their innocence. No matter how rational such an approach might be—no matter how acceptable in a community where equality of status is the dominant goal—it is obnoxious to the concept of individual freedom protected by the Due Process Clause. If ever accepted in this country, it would work a fundamental change in the character of our free society.

Nor is this an Eighth Amendment case.[2] That provision of the Constitution protects individuals convicted of crimes from punishment that is cruel and unusual. The pretrial detainees whose rights are at stake in this case, however, are innocent men and women who have been convicted of no crimes. Their claim is not that they have been subjected to cruel and unusual punishment in violation of the Eighth Amendment, but that to subject them to any form of punishment at all is an unconstitutional deprivation of their liberty.

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[1] "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U. S. Const., Amdt. 14, § 1.

[2] "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U. S. Const., Amdt. 8.

This is a due process case.[3] The most significant—and I venture to suggest the most enduring—part of the Court's opinion today is its recognition of this initial constitutional premise. The Court squarely holds that "under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law."[4] *Ante*, at 535.

This right to be free of punishment is not expressly embodied in any provision in the Bill of Rights. Nor is the source of this right found in any statute. The source of this fundamental freedom is the word "liberty" itself as used in the Due Process Clause, and as informed by "history, reason, the past course of decisions," and the judgment and experience of "those whom the Constitution entrusted" with interpreting that word. *Anti-Fascist Committee* v. *McGrath*, 341 U. S. 123, 162–163 (Frankfurter, J., concurring). See *Leis* v. *Flynt*, 439 U. S. 438, 457 (STEVENS, J., dissenting).

In my opinion, this latter proposition is obvious and indisputable.[5] Nonetheless, it is worthy of emphasis because the Court has now accepted it in principle. *Ante*, at 535. In recent years, the Court has mistakenly implied that the concept of liberty encompasses only those rights that are either created by statute or regulation or are protected by an express provision of the Bill of Rights.[6] Today, however, without the help of any statute, regulation, or express provision of the Constitution, the Court has derived the innocent person's right not to be punished from the Due Process Clause itself. It has accordingly abandoned its parsimonious definition of

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[3] Because this is a federal facility, it is, of course, the Fifth Amendment that applies. It provides, in relevant part: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

[4] Because MR. JUSTICE MARSHALL does not accept this basis for analysis, see *ante*, at 568–569, I have added this separate dissent even though I agree with much of his analysis and most of his criticism of the Court.

[5] See *Meachum* v. *Fano*, 427 U. S. 215, 230 (STEVENS, J., dissenting).

[6] See *Leis* v. *Flynt*, 439 U. S. 438, 443; *Paul* v. *Davis*, 424 U. S. 693.

the "liberty" protected by the majestic words of the Clause. I concur in that abandonment. It is with regard to the scope of this fundamental right that we part company.

I

Some of the individuals housed in the Metropolitan Correction Center (MCC) are convicted criminals.[7] As to them, detention may legitimately serve a punitive goal, and there is strong reason, even apart from the rules challenged here, to suggest that it does.[8] But the same is not true of the detainees who are also housed there and whose rights we are called upon to address. Notwithstanding the impression created by the Court's opinion, see, *e. g., ante,* at 562, these people are not "prisoners": [9] they have not been convicted of any crimes, and their detention may serve only a more limited, regulatory purpose.[10] See *Houchins* v. *KQED, Inc.,* 438 U. S. 1, 37–38 (STEVENS, J., dissenting).

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[7] The facility is used to house convicted persons who are temporarily in New York for court appearances and the like, as well as some who are confined there for the duration of short sentences.

[8] There is neither time, staff, nor opportunity to offer convicted inmates at MCC the kind of training or treatment that is sometimes available in a prison environment.

[9] See Webster's Third International Dictionary 1804 (1961) (As *"often"* used, a "prison" is "an institution for the imprisonment of persons convicted of major crimes or felonies: a penitentiary as distinguished from a reformatory, local jail, or detention home").

[10] Long-term incarceration and other postconviction sanctions have significant backward-looking, personal, and normative components. Because they are primarily designed to inflict pain or to "correct" the individual because of some past misdeed, the sanctions are considered punitive. See E. Pincoffs, The Rationale of Legal Punishment 51–57 (1966). See also *Gregg* v. *Georgia,* 428 U. S. 153, 184, and n. 30 (opinion of STEWART, POWELL, and STEVENS, JJ.); H. Hart, Punishment and Responsibility 4–5 (1968); *id.,* at 158–173; F. Dostoevskii, Crime and Punishment (Coulson transl. 1964); I. Kant, The Philosophy of Law 195–198 (W. Hastie transl. 1887).

By contrast, pretrial detention is acceptable as a means of assuring the

Prior to conviction every individual is entitled to the benefit of a presumption both that he is innocent of prior criminal conduct and that he has no present intention to commit any offense in the immediate future.[11] That presumption does

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detainee's presence at trial and of maintaining his and his fellows' safety in the meantime. Its focus is therefore essentially forward looking, general, and nonnormative. Because this type of government sanction is primarily designed for the future benefit of the public at large and implies no moral judgment about the person affected, it is properly classified as regulatory. See H. Packer, The Limits of the Criminal Sanction 5 (1968).

The Court's bill of attainder cases have recognized the distinction between regulation and punishment in analyzing the concept of "legislative punishment." Thus, on the one hand, post bellum statutes excluding persons who had been sympathetic to the Confederacy from certain professions were found unconstitutional because of the backward-looking focus on the acts of specific individuals. *Ex parte Garland,* 4 Wall. 333; *Cummings* v. *Missouri,* 4 Wall. 277. However, later statutes requiring persons to take loyalty oaths before getting the benefits of certain labor legislation and before being employed in a public job were found constitutional because of their future orientation and more general purpose. *American Communications Assn.* v. *Douds,* 339 U. S. 382, 413–415; *Garner* v. *Board of Public Works,* 341 U. S. 716, 722–725.

[11] On at least two occasions, this Court has relied upon this presumption as a justification for shielding a person awaiting trial from potentially oppressive governmental actions. *McGinnis* v. *Royster,* 410 U. S. 263, 273 ("[I]t would hardly be appropriate for the State to undertake in the pretrial detention period programs to rehabilitate a man still clothed with a presumption of innocence"); *Stack* v. *Boyle,* 342 U. S. 1, 4 ("Unless [the] right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning"). These cases demonstrate that the presumption—or, as it was called last Term, the "assumption"—of innocence that is indulged until evidence has convinced a jury to the contrary beyond a reasonable doubt, see *Taylor* v. *Kentucky,* 436 U. S. 478, 484 n. 12, colors all of the government's actions toward persons not yet convicted. In sum, although there may be some question as to what it means to treat a person as if he were guilty, there can be no dispute that the government may never do so at any point in advance of conviction.

Relying on nothing more than the force of assertion, and without even mentioning *McGinnis* and *Stack,* the Court states that the presumption of innocence "has no application to a determination of the rights of a pretrial

not imply that he may not be detained or otherwise subjected to restraints on the basis of an individual showing of probable cause that he poses relevant risks to the community. For our system of justice has always and quite properly functioned on the assumption that probable cause to believe (1) that a person has committed a crime, and (2) that absent the posting of bail he poses at least some risk of flight,[12] justifies pretrial detention to ensure his presence at trial.[13]

The fact that an individual may be unable to pay for a bail bond, however, is an insufficient reason for subjecting him to indignities that would be appropriate punishment for convicted felons. Nor can he be subject on that basis to onerous restraints that might properly be considered regulatory with respect to particularly obstreperous or dangerous arrestees. An innocent man who has no propensity toward immediate violence, escape, or subversion may not be dumped into a pool of second-class citizens and subjected to restraints designed to regulate others who have. For him, such treatment

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detainee during confinement before his trial has even begun." *Ante*, at 533. But having so recently reiterated that the presumption is "fundamental," see *Taylor* v. *Kentucky*, *supra*, at 483, I cannot believe the Court means what it seems to be saying.

[12] In many instances, detention will occur although the risk of flight is exceedingly low. This is because there is "a large class of persons for whom any bail at all is 'excessive bail.' They are the people loosely referred to as 'indigents.' Studies of the operation of the bail system have demonstrated that even at the very lowest levels of bail—say $500, where the bail bond premium may be only $25 or $50—there is a very substantial percentage of persons who do not succeed in making bail and are therefore held in custody pending trial." Packer, *supra* n. 10, at 216.

[13] American jurisdictions have traditionally relied on a pretrial system of "bail or jail" to assure that arrestees appear at trial. *Id.*, at 211. As to the bail aspect of the system, the Eighth Amendment is explicit that whatever steps the Government takes must not be excessive in relation to that purpose. *Stack* v. *Boyle*, *supra*, at 5. See 18 U. S. C. § 3146 (a). Although not expressed in the Constitution, a like restraint on the other half of the pretrial system is a logical corollary to the "No Excess Bail" Clause.

amounts to punishment. And because the due process guarantee is individual and personal, it mandates that an innocent person be treated as an individual human being and be free of treatment which, as to him, is punishment.[14]

It is not always easy to determine whether a particular restraint serves the legitimate, regulatory goal of ensuring a detainee's presence at trial and his safety and security in the meantime, or the unlawful end of punishment. But the courts have performed that task in the past, and can and should continue to perform it in the future. Having recognized the constitutional right to be free of punishment, the Court may not point to the difficulty of the task as a justification for confining the scope of the punishment concept so narrowly that it effectively abdicates to correction officials the judicial responsibility to enforce the guarantees of due process.

In addressing the constitutionality of the rules at issue in this case, the Court seems to say that as long as the correction officers are not motivated by "an expressed intent to punish" their wards, *ante*, at 538, and as long as their rules are not "arbitrary or purposeless," *ante*, at 539, these rules are an acceptable form of regulation and not punishment. Lest that test be too exacting, the Court abjectly defers to the prison administrator unless his conclusions are " 'conclusively shown to be wrong.' " *Ante*, at 555, quoting *Jones* v. *North Carolina Prisoners' Labor Union*, 433 U. S. 119, 132.[15]

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[14] Indeed, this Court has recognized on previous occasions that individualization is sometimes necessary to prevent clearly punitive sanctions from being administered in a cruel and unusual manner. *Woodson* v. *North Carolina*, 428 U. S. 280, 304; *Trop* v. *Dulles*, 356 U. S. 86, 100.

[15] Even if the Court were to apply this aspect of its test in a meaningful way, it would add little to the concept of punishment that is impermissible under the Due Process Clause. The Court states this test as follows: "[I]f a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitution-

Applying this test, the Court concludes that enforcement of the challenged restrictions does not constitute punishment because there is no showing of a subjective intent to punish and there is a rational basis for each of the challenged rules. In my view, the Court has reached an untenable conclusion because its test for punishment is unduly permissive.

The requirement that restraints have a rational basis provides an individual with virtually no protection against punishment. Any restriction that may reduce the cost of the facility's warehousing function could not be characterized as "arbitrary or purposeless" and could not be "conclusively shown" to have no reasonable relation to the Government's mission.[16] This is true even of a restraint so severe that it might be cruel and unusual.

Nor does the Court's intent test ensure the individual the protection that the Constitution guarantees. For the Court seems to use the term "intent" to mean the subjective intent of the jail administrator. This emphasis can only "encourage hypocrisy and unconscious self-deception."[17] While a

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ally be inflicted upon detainees *qua* detainees." *Ante*, at 539. It is readily apparent that this standard is nothing more than the "rational basis" requirement that even presumptively valid economic and social regulations must satisfy to pass muster under the Due Process Clause. Accordingly, if a court followed the path proposed in the quotation above, it would take unnecessary steps. For governmental activity that affects even minor interests and is "arbitrary or purposeless" is unconstitutional whether or not it is punishment. See, *e. g.*, *Rinaldi* v. *Yeager*, 384 U. S. 305; *Illinois Elections Board* v. *Socialist Workers Party*, 440 U. S. 173.

[16] Beyond excluding expressly intended punishment, the Court puts no restrictions on the goals that it recognizes as legitimate; under its test the Government need only show some rational nexus to security, order, or the apparently open-ended class of "operational concerns" facing the jail administrator, *ante*, at 540, and the restriction will be upheld.

[17] "[The subjective approach] focuses on what an interested party intends rather than on what a detached observer thinks, thereby depriving the distinction [between punishment and other types of government activity] of any pretense to objectivity. If a prison warden thinks that his

subjective intent may provide a sufficient reason for finding that punishment has been inflicted, such an intent is clearly not a necessary nor even the most common element of a punitive sanction.

In short, a careful reading of the Court's opinion reveals that it has attenuated the detainee's constitutional protection against punishment into nothing more than a prohibition against irrational classifications or barbaric treatment. Having recognized in theory that the source of that protection is the Due Process Clause, the Court has in practice defined its scope in the far more permissive terms of equal protection and Eighth Amendment analysis.

Prior to today, our cases have unequivocally adopted a less obeisant and more objective approach to punishment than the one the Court applies here. In my judgment, those decisions provide the framework for the correct analysis of the punishment issue in this case.

The leading case is *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144. The Court's conclusion that the statute in question was punitive was expressly based on "the objective manifestations of congressional purpose." *Id.*, at 169.[18] The Court also recognized that in many cases such manifestations as it relied upon—the wording and construction of predecessor

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inmates are better off in his custody than they would be in the world outside, then by [the subjective] definition what he is administering is Treatment rather than Punishment. If the legislature that passes a compulsory commitment statute for narcotics addicts is motivated by hostility toward addicts, commitment is Punishment; if it is motivated by compassion, commitment is Treatment. And if it is motivated by both hostility and compassion? Other objections aside, what use can possibly be made of such a definition?

"Other objections cannot be left aside, because they demonstrate that [the subjective] definition not only is unintelligible but leads to quite dangerous consequences. . . . [For] [t]o allow the characterization to turn on the intention of the administrator is to encourage hypocrisy and unconscious self-deception." Packer, *supra* n. 10, at 32–33.

[18] Accord, *United States* v. *Lovett*, 328 U. S. 303, 311.

provisions as well as the congressional Reports on the provision itself, *id.*, at 169–184—would be unavailable [19] or untrustworthy.[20] In such cases, which surely include those in which the actions of an administrator rather than an Act of Congress are at issue, the Court stated that certain other "criteria" must be applied "to the face" of the official action to determine if it is punitive. *Ibid.* Illustrative of these objective "criteria" were several listed by the Court:

> "Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned . . . ." *Id.*, at 168–169.

Today the Court does not expressly disavow the objective criteria identified in *Mendoza-Martinez*. In fact, in a footnote, see *ante*, at 539 n. 20, it relies on one of those criteria in order to answer an otherwise obvious criticism of the test the Court actually applies in this case. Under the test as the Court explains it today, prison guards could make regular use of dungeons, chains, and shackles, since such practices would make it possible to maintain security with a smaller number of guards. Commendably, however, the Court expressly rejects this application of its test by stating that the avail-

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[19] Some state courts have had to resort to such criteria even when analyzing the punitive content of legislation because many state assemblies publish no record of their deliberations. *E. g., Starkweather* v. *Blair*, 245 Minn. 371, 71 N. W. 2d 869 (1955).

[20] "[E]ven a clear legislative classification of a statute as 'non-penal' would not alter the fundamental nature of a plainly penal statute." *Trop* v. *Dulles*, 356 U. S., at 95 (plurality opinion).

ability of less harsh alternatives would give rise to an inference that the practice was motivated by an intent to punish.

Although it is not easy to reconcile the footnote rejection of chains and shackles with the rest of the Court's analysis, this footnote confirms my view that a workable standard must allow a court to infer that punishment has been inflicted by evaluating objective criteria such as those delineated in *Mendoza-Martinez*. When sanctions involve "affirmative disabilit[ies]" and when they have "historically been regarded as a punishment," *Kennedy* v. *Mendoza-Martinez*, 372 U. S., at 168–169, courts must be sensitive to the possibility that those sanctions are punitive. So, too, when the rules governing detention fail to draw any distinction among those who are detained—suggesting that all may be subject to rules designed for the most dangerous few—careful scrutiny must be applied. Finally, and perhaps most important, when there is a significant and unnecessary disparity between the severity of the harm to the individual and the demonstrated importance of the regulatory objective, see *ibid.*, courts must be justified in drawing an inference of punishment.

II

When measured against an objective standard, it is clear that the four rules discussed in Part III of the Court's opinion are punitive in character. All of these rules were designed to forestall the potential harm that might result from smuggling money, drugs, or weapons into the institution. Such items, it is feared, might be secreted in hard-cover books, packages of food or clothing, or body cavities. That fear provides the basis for a total prohibition on the receipt of hard-cover books (except from publishers, book clubs, or bookstores) or packages of food, for a visual search of body cavities after every visit, and for excluding the detainee from his cell while his personal belongings are searched by a guard.

There is no question that jail administrators have a legitimate interest in preventing smuggling. But it is equally

clear that that interest is being served here in a way that punishes many if not all of the detainees.

The challenged practices concededly deprive detainees of fundamental rights and privileges of citizenship beyond simply the right to leave. The Court recognizes this premise, but it dismisses its significance by asserting that detainees may be subjected to the "'withdrawal or limitation'" of fundamental rights. *Ante*, at 546, quoting *Price* v. *Johnston*, 334 U. S. 266, 285.[21] I disagree. The withdrawal of rights is

[21] Although the Court's discussion of this point is laced with citations of prison cases such as *Price*, *ante*, at 545–547, it fails to mention a single precedent dealing with pretrial detainees. Cf. *Houchins* v. *KQED, Inc.*, 438 U. S. 1, 37–38 (STEVENS, J., dissenting); *O'Brien* v. *Skinner*, 414 U. S. 524; *Goosby* v. *Osser*, 409 U. S. 512.

Having concluded that detainees' rights are "limited," the Court is reduced, for example, to analyzing restrictions on First Amendment rights in the deferential language of "minimum rationality"—language traditionally applied to restrictions on economic activities such as selling hot dogs or eyeglasses. *New Orleans* v. *Dukes*, 427 U. S. 297; *Williamson* v. *Lee Optical Co.*, 348 U. S. 483.

The First Amendment is not the only victim of the Court's analysis. It also devalues the Fourth Amendment as it applies to pretrial detainees. This is particularly evident with respect to the Court's discussion of body-cavity searches. Although it recognizes the detainee's constitutionally protected interest in privacy, the Court immediately demeans that interest by affording it "diminished scope." The reason for the diminution is the detainee's limited expectation of privacy. *Ante*, at 557, 558. At first blush, the Court's rationale appears to be that once the detainee is told that he will not be permitted to carry on any of his activities in private, he cannot "reasonably" expect otherwise. But "reasonable expectations of privacy" cannot have this purely subjective connotation lest we wake up one day to headlines announcing that henceforth the Government will not recognize the sanctity of the home but will instead enter residences at will. The reasonableness of the expectation must include an objective component that refers to those aspects of human activity that the "reasonable person" typically expects will be protected from unchecked Government observation. Cf. *Katz* v. *United States*, 389 U. S. 347, 361 (Harlan, J., concurring). Hence, the question must be whether the Government *may*, without violating the Fourth Amendment, tell the detainee by words or by action that he has no or virtually no right to privacy. In my view, the

itself among the most basic punishments that society can exact, for such a withdrawal qualifies the subject's citizenship and violates his dignity.[22] Without question that kind of harm is an "affirmative disability" that "has historically been regarded as a punishment." [23]

This withdrawal of fundamental rights is not limited to those for whom punishment is proper, or to those detainees

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answer to this question must be negative: despite the fact of his confinement and the impossibility of retreat to the privacy of his home, the detainee must have the right to privacy that we all retain when we venture out into public places. And surely the scope of that privacy is not so diminished that it does not include an expectation that body cavities will not be exposed to view. Absent probable cause, therefore, I would hold that such searches of pretrial detainees may not occur.

[22] The classic example of the coincidence of punishment and the total deprivation of rights is voting. Thus, in *Richardson* v. *Ramirez*, 418 U. S. 24, the Court, although recognizing the importance of the right to vote, *id.*, at 54, see *Reynolds* v. *Sims*, 377 U. S. 533, 561, found support in § 2 of the Fourteenth Amendment for denying convicted felons the right to vote. Cf. *O'Brien* v. *Skinner*, *supra* (finding certain restrictions on absentee voting by pretrial detainees unconstitutional under the Equal Protection Clause). See also *Goosby* v. *Osser*, *supra*.

This is certainly not to say that the fact of conviction justifies the total deprivation of all constitutionally protected rights. Having abandoned the concept of the prisoner as a slave of the state, *e. g.*, *Morrissey* v. *Brewer*, 408 U. S. 471, the Court has also rejected any ironclad exclusion of such persons from the protection of the Constitution. *E. g.*, *Wolff* v. *McDonnell*, 418 U. S. 539, 555–556; *Pell* v. *Procunier*, 417 U. S. 817, 822; *Cruz* v. *Beto*, 405 U. S. 319; *Lee* v. *Washington*, 390 U. S. 333. Nonetheless, it also recognizes "that a prison inmate retains [only those] rights that are not inconsistent . . . with the legitimate penological objectives of the corrections system." *Pell* v. *Procunier*, *supra*, at 822. Cf. *Lanza* v. *New York*, 370 U. S. 139.

[23] *E. g.*, *Wolff* v. *McDonnell*, *supra*, at 555; *Richardson* v. *Ramirez*, *supra*, at 43–53. The Court has probably relied upon historical analysis more often than on any of the other objective factors discussed in *Kennedy* v. *Mendoza-Martinez*, in determining whether some government sanction is punitive. *E. g.*, *Cummings* v. *Missouri*, 4 Wall. 277; *Ex parte Wilson*, 114 U. S. 417, 426–429; *Mackin* v. *United States*, 117 U. S. 348, 350–352; *Wong Wing* v. *United States*, 163 U. S. 228, 237–238.

posing special security risks. The MCC houses convicted persons along with pretrial detainees. The former may constitutionally be punished, so long as that punishment is not cruel and unusual. And the fact of their long-term confinement may provide greater justification for concerns with ongoing smuggling operations, violence, or escape.[24] Moreover, there may certainly be among the pretrial detainees, who cannot be punished, some whose background or history suggests a special danger that they will attempt to smuggle contraband into the jail. The rules at issue here, however, are not limited to those who may be constitutionally punished, or to those particularly dangerous detainees for whom onerous restraint is an appropriate regulation. Rather, the rules apply indiscriminately to all.

It is possible, of course, that the MCC officials have determined not to punish the convicted criminals who are confined there, but merely to regulate or detain them. It is possible, too, that as to the detainees, the rules that have been adopted and that are at issue here serve to impose only those restraints

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[24] The prospect of long-term incarceration facing an inmate increases his incentive to use illicit means to obtain luxuries that his imprisonment would otherwise deny him. Moreover, the fact of long-term incarceration of a large number of persons is conducive to the development of an institutional subeconomy and even subgovernment that often thrives on contraband and is inconsistent with the orderly operation of the facility. See, *e. g.*, H. Mattick, The Prosaic Sources of Prison Violence, Occasional Papers of the University of Chicago Law School, No. 3, Mar. 15, 1972.

As the foregoing indicates, I believe the analysis of the four rules as applied to convicted prisoners is different from that as applied to pretrial detainees. Not only do the due process and other rights of the two have different scope, but the Government's security interests also differ. In my view, the courts below, in erroneously applying the same standards to both sets of inmates and in focusing on detainees, did not adequately develop the record with respect to convicts. Accordingly, I would remand the question of the validity of the four rules in the context of convicted prisoners for further proceedings. Cf. *United States ex rel. Miller* v. *Twomey*, 479 F. 2d 701, 719 (CA7 1973).

needed to regulate the least dangerous of the group. But the Government does not even suggest that the convicted criminals are not being punished during the confinement at MCC.[25] And common sense suggests that if one set of rules is applied indiscriminately to detainees, those rules will serve to regulate the most dangerous—not the least—of the group. Indeed, prison security might well be in jeopardy were it otherwise. If that is true, and if the restraints are as substantial and fundamental as those here, then the conclusion that at least some, if not all, of the detainees are being punished is virtually inescapable.

That this is indeed the case here is confirmed by the excessive disparity between the harm to the individuals occasioned by these rules and the importance of their regulatory objective. The substantiality of the harm to the detainees cannot be doubted. The rights involved are among those that are specifically protected by the Constitution. That fact alone underscores our societal evaluation of their importance. The enforcement of these rules in the MCC, moreover, is a clear affront to the dignity of the detainee as a human being.[26]

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[25] In fact, the Government admitted below that the "restrictions on the possession of personal property" at MCC "serve the legitimate purpose of punishment" with respect to convicted inmates as well as the security purposes relied on in the present context of pretrial detainees. *United States ex rel. Wolfish* v. *Levi*, 439 F. Supp. 114, 153 (SDNY 1977).

[26] This affront may itself constitute punishment because of its retributive character. *Mendoza-Martinez* makes clear that a sanction is punitive if it "will promote [a] traditional ai[m] of punishment—retribution." 372 U. S., at 168–169. In its retributive aspect, "'[p]unishment is the way in which society expresses its denunciation for wrong doing.'" *Gregg* v. *Georgia*, 428 U. S., at 184, and n. 30 (opinion of STEWART, POWELL, and STEVENS, JJ.), quoting Lord Justice Denning's testimony before the Royal Commission on Capital Punishment. See also letter from Judge Learned Hand to the editors of the University of Chicago Law Review (undated), reprinted in 22 U. Chi. L. Rev. 319 (1965); sources cited in the first paragraph of n. 10, *supra*. A focus of this "denunciatory" approach is the right of society, in significant respects, to deny the civic and human dignity

To prohibit detainees from receiving books or packages communicates to the detainee that he, his friends, and his family cannot be trusted. And in the process, it eliminates one of his few remaining contacts with the outside world. The practice of searching the detainee's private possessions in his absence, frequently without care, *United States ex rel. Wolfish* v. *Levi*, 439 F. Supp. 114, 149 (SDNY 1977), offends not only his privacy interest, but also his interest in "minimal dignity," *ibid.* Finally, the search of private body cavities has been found to engender "deep degradation" and "terror" in the inmates, *id.*, at 147: the price of such searches is so high as to lead detainees to forgo visits with friends and family altogether. *Id.*, at 148.

In contrast to these severe harms to the individual, the interests served by these rules appear insubstantial. As to the room searches, nothing more than the convenience of the corrections staff supports the refusal to allow detainees to observe at a reasonable distance. While petitioners have raised the fear that inmates may become violent during such searches and may distract the guards, the District Court specifically found that they had made no showing of any pattern of violence or disruption to support these purported fears. *Id.*, at 149. And absent such a showing, there is no more reason to ban all detainees from observing the searches of their rooms than there would be to ban them from every area in the MCC where guards or other inmates are present.

The prohibitions on receiving books and packages fare no better. The District Court found no record of "untoward experience" with respect to the book rule, *United States ex rel. Wolfish* v. *United States*, 428 F. Supp. 333, 340 (SDNY 1977), and no support in the evidence for the petitioners' "dire predictions" as to packages, 439 F. Supp., at 152. The simple

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of persons who have been convicted of doing wrong. Cf. *Gregg* v. *Georgia*, *supra*, at 173, 182 (fundamental violations of "human dignity" may constitute cruel and unusual punishment).

fact is, and the record and the case law make clear, that in many prisons housing criminals convicted of serious crimes—where the inmates as a class may well be more dangerous, where smuggling is likely to be a far more serious problem, and where punishment is appropriate—packages of various sorts are routinely admitted subject to inspection. *Ibid.* The administrators here have hardly established that the corrections staff at MCC is incapable of performing similar inspections with respect to an inmate population which has a far greater entitlement to them. And the unsupported claim that food or goods may be used for barter or may introduce sanitation problems ignores not only the possibility of reasonable regulation, but also the fact that similar goods are sold in the MCC commissary, *id.*, at 152–153, and are no more immune from barter or spoilage.

The body-cavity search—clearly the greatest personal indignity—may be the least justifiable measure of all. After every contact visit a body-cavity search is mandated by the rule. The District Court's finding that these searches have failed in practice to produce any demonstrable improvement in security, *id.*, at 147, is hardly surprising.[27] Detainees and their visitors are in full view during all visits, and are fully clad. To insert contraband in one's private body cavities during such a visit would indeed be "an imposing challenge to nerves and agility." *Ibid.* There is no reason to expect, and the petitioners have established none, that many pretrial detainees would attempt, let alone succeed, in surmounting this challenge absent the challenged rule. Moreover, as the District Court explicitly found, less severe alternatives are available to ensure that contraband is not transferred during visits. *Id.*, at 147–148. Weapons and other dangerous instruments, the items of greatest legitimate concern, may be

[27] Indeed, the District Court found the searches entirely ineffective in some of their most offensive manifestations (*e. g.*, anal searches). 439 F. Supp., at 147.

discovered by the use of metal detecting devices or other equipment commonly used for airline security. In addition, inmates are required, even apart from the body-cavity searches, to disrobe, to have their clothing inspected, and to present open hands and arms to reveal the absence of any concealed objects. These alternative procedures, the District Court found, "amply satisf[y]" the demands of security. *Id.*, at 148. In my judgment, there is no basis in this record to disagree.

It may well be, as the Court finds, that the rules at issue here were not adopted by administrators eager to punish those detained at MCC. The rules can all be explained as the easiest way for administrators to ensure security in the jail. But the easiest course for jail officials is not always one that our Constitution allows them to take. If fundamental rights are withdrawn and severe harms are indiscriminately inflicted on detainees merely to secure minimal savings in time and effort for administrators, the guarantee of due process is violated.

In my judgment, each of the rules at issue here is unconstitutional. The four rules do indiscriminately inflict harm on all pretrial detainees in MCC. They are all either unnecessary or excessively harmful, particularly when judged against our historic respect for the dignity of the free citizen. I think it is unquestionably a form of punishment to deny an innocent person the right to read a book loaned to him by a friend or relative while he is temporarily confined, to deny him the right to receive gifts or packages, to search his private possessions out of his presence, or to compel him to exhibit his private body cavities to the visual inspection of a guard. Absent probable cause to believe that a specific individual detainee poses a special security risk, none of these practices would be considered necessary, or even arguably reasonable, if the pretrial detainees were confined in a facility separate and apart from convicted prisoners. If reasons of

convenience justify intermingling the two groups, it is not too much to require the facility's administrator to accept the additional inspection burdens that would result from denying them the right to subject citizens to these humiliating indignities. I would affirm the judgment of the Court of Appeals as to all four of these rules.[28]

III

The so-called "double-bunking" issue was resolved by the District Court on cross-motions for summary judgment. The record was compiled and the issue decided on the basis of a legal test that all of us now agree was erroneous.[29] If the record is incomplete, or if it discloses any material question of fact concerning the punitive character of the housing conditions at MCC, a remand for trial is required. Three basic facts dictate that result.

First, as earlier emphasized, MCC houses convicted prisoners along with pretrial detainees. Both classes of inmates are subjected to the same conditions. It may be that the Government—despite representations to the contrary, see 439 F. Supp., at 153—conceives of the confinement of convicts in the facility as a vacation for them from the punitive rigors of prison life. But the opposite conclusion—that the detainees are instead being subjected to some of those rigors—is at least an equally justifiable inference from the facts revealed by the record, particularly in view of the other rules applicable to both classes.

Second, the Government acknowledges that MCC has been used to house twice as many inmates as it was designed to

[28] The District Court reserved decision on all of these practices save the restriction on receipt of hardback books until a full trial on the merits. It is accordingly appropriate to resolve these issues now without a remand.

[29] I do not understand how the Court, having quite thoroughly demonstrated that the District Court applied an erroneous legal test, *ante*, at 530, 532–535, can nonetheless rely on that court's conclusion that no disputed issues of material fact prevented it from applying its erroneous test to the housing issue. *Ante*, at 541 n. 24.

accommodate.[30] The design capacity of a building is one crucial indication of its purpose. So is the later abandonment of that design in favor of a substantially more crowded and

[30] "The decisive reality, however, not seriously open to debate, is that the rooms were *designed* and built to hold a single person, not more. The conclusion is compelled by an array of undisputed facts. To begin with, petitioners invoke the high authority of the architect who designed the MCC and who, in sworn testimony recorded in this court, has described a room like the ones he drew, housing one inmate, as a 'very basic planning principle.' Contrasting dormitories with rooms, he went on to say:

" 'Dormitories are a much more flexible kind of a thing, you see. That is the only real area in that particular facility. One of the reasons why there's been a tendency to go to single rooms is because it's a very clear and apparent violation of capacity when you try to put two people in a room. You can't put one and a third persons in a room. You can always up the population of a space, in which you put people in, and you can through more imaginative planning get better utilization of the space but there is an absoluteness of a room which is designed for one person, and to try to convert it into a two-person room, it's a clear violation of the capability of that space. There is no question there. There is more than enough, you know, objections to double-celling.'

"It is not necessary by any means to rely solely on what the architect *said;* the plain visual evidence of what he did demonstrates that the rooms he designed were for one inmate, not two or more. There is no place for each of two people, assigned by others to this unwanted intimacy, to walk or eat or write a letter or be quiet or be outside another's toilet. There is one shelf for toiletries and one for other things, neither adequate for two people. In the larger group of 100 double-celled rooms there is no place to hang a garment. The double-decker bunks by which these rooms have been changed from singles are so constructed that air from a vent, cold during our winter visit, blows out onto the upper bed a foot or so above body level. Many of the prisoners have blocked the vents to cope with this architecturally unintended unpleasantness. And, as a result the rooms are musty and unpleasant smelling. The single beds originally designed for these rooms each had two drawers built under them, mounted on casters for reasonably convenient use. In the reconstruction to house two inmates, it was found necessary to dismantle these caster arrangements; now each 'double' room has one of the old drawers lying loose under the lower bed or none at all for the two assigned occupants." *United States ex rel. Wolfish* v. *United States,* 428 F. Supp. 333, 336–337 (SDNY 1977) (footnote omitted; emphasis in original).

oppressive one. Certainly, the inference that what the architect designed to detain, the jailer has used to punish, is permissible, even if it may not be compelled or even probable.

Finally, MCC officials experienced little difficulty in complying with the preliminary order of the District Court to return the facility to its design capacity. The Court dismisses this fact as not *conclusive* on the question of purpose and reasonableness. *Ante*, at 542–543, n. 25. But the fact that the Government's lawful regulatory purpose could so easily be served by less severe conditions is certainly some evidence of a punitive purpose and of excessiveness. If the lawful purpose may be equally served by those new conditions at no greater cost, the record provides a basis for arguing that there is no legitimate reason for the extra degree of severity that has characterized the overcrowded conditions in the past.[31]

While I by no means suggest that any of these facts demonstrates that the detention conditions are punitive,[32] taken

[31] To these facts may be added some of the findings of the District Court: (1) Even at design capacity, "movement is more restricted at the MCC than in most other federal facilities," including those that exclusively house convicts, 439 F. Supp., at 125; (2) the doubling of the design capacity of individual cells leaves "no place for each of two people, assigned by others to this unwanted intimacy, to walk or eat or write a letter or be quiet or be outside another's toilet," places the person in the newly added upper bunk directly under the cold air vent, renders some of the furniture designed for the rooms unusable, and in general subjects the inmate to "foul odors, social stigma, humiliation, and denials of minimal privacy," 428 F. Supp., at 337, 339; (3) overall, the "living conditions [are] grossly short of minimal decency, and [have] no semblance of justification except [for] the general defense that the facilities of the Bureau of Prisons are *in toto* insufficient to house all the people consigned to them," 439 F. Supp., at 135. Without so stating expressly, the Court has rejected these findings. *Ante*, at 542–543. Because that rejection is not permissible absent a determination of clear error, and because no such determination has been made, its treatment of the District Court's findings is inexplicable. See *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U. S. 100, 123.

[32] The ameliorative factors discussed by the Court, *ante*, at 542–543, might well convince the factfinder that the housing conditions are not punitive.

together they raise an issue of fact that should not be resolved by this Court, or even by the District Court, on a motion for summary judgment.

It is admittedly easier to conclude that the Due Process Clause prohibits preconviction punishment than it is to articulate a standard for determining if such punishment has occurred. But if the standard is to afford any meaningful protection for the citizen's liberty, it must require something more than either an explicit statement by the administrator that his rule is designed to inflict punishment, or a sanction that is so arbitrary that it would be invalid even if it were not punitive. However the test is phrased, it must at least be satisfied by an unexplained and significant disparity between the severity of the harm to the individual and the demonstrated importance of the nonpunitive objective served by it. I therefore respectfully dissent from the conclusion that the demeaning and unnecessary practices described in Part III of the Court's opinion do not constitute punishment, and also from the conclusion that the overcrowded housing conditions discussed in Part II do not even give rise to an inference that they have punitive qualities.

CHAPMAN, COMMISSIONER, DEPARTMENT OF HUMAN RESOURCES OF TEXAS, ET AL. *v.* HOUSTON WELFARE RIGHTS ORGANIZATION ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 77-719. Argued October 2, 1978—Decided May 14, 1979*

Under 28 U. S. C. § 1343 (3), federal district courts have jurisdiction over civil actions "authorized by law" claiming a deprivation, under color of state law, of rights "secured by the Constitution of the United States or by any Act of Congress providing for equal rights," and under § 1343 (4) have jurisdiction over such actions seeking relief under "any Act of Congress providing for the protection of civil rights, including the right to vote." Petitioner in No. 77-5324 brought suit in Federal District Court claiming that New Jersey officials, by denying her emergency assistance funds because she was not "in a state of homelessness" as required by the relevant state regulations, had deprived her of a right to such assistance "necessary to avoid destitution" within the meaning of § 406 (e) (1) of the federal Social Security Act. The District Court held, *inter alia*, that the complaint stated a cause of action under 42 U. S. C. § 1983 (which provides that every person who, under color of any state statute or regulation subjects another to the deprivation of any rights "secured by the Constitution and laws" shall be liable to the party injured in an action at law or suit in equity) and that it had jurisdiction under §§ 1343 (3) and (4). The Court of Appeals held that the District Court should have dismissed the complaint for want of jurisdiction; that a constitutional claim must involve more than a contention that the Supremacy Clause requires that a federal statute be given effect over conflicting state law; that the Social Security Act is not an Act of Congress securing either "equal rights" or "civil rights" as those terms are used in § 1343; and that those terms limit the grant of federal jurisdiction under § 1343 even if § 1983 creates a remedy for a broader category of statutory claims. Respondents in No. 77-719 brought a class action in Federal District Court claiming that Texas

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*Together with No. 77-5324, *Gonzalez, Guardian* v. *Young, Director, Hudson County Welfare Board, et al.*, on certiorari to the United States Court of Appeals for the Third Circuit.

regulations requiring that Aid to Families with Dependent Children benefits be reduced if the recipient shares a household with a nondependent person violate § 402 (a) (7) of the Social Security Act and implementing regulations. The District Court's judgment upholding the Texas regulations was reversed by the Court of Appeals, but the appellate court held that the District Court had jurisdiction under § 1343 (4) since § 1983 is an Act of Congress providing for the protection of civil rights within the meaning of the jurisdictional grant.

Held: Federal district courts' jurisdiction under §§ 1343 (3) and (4) does not encompass claims, such as those involved here, that a state welfare regulation is invalid because it conflicts with the Social Security Act, and hence the District Court in neither case had jurisdiction. Pp. 607–623.

(a) To give meaning to § 1343, it must be concluded that an allegation of incompatibility between federal and state statutes and regulations does not, in itself, give rise to a claim "secured by the Constitution" within the meaning of § 1343 (3). The entire reference in § 1343 (3) to rights secured by an Act of Congress would be unnecessary if the earlier reference to constitutional claims embraced those resting solely on the Supremacy Clause, and, more importantly, the additional language describing a limited category of Acts of Congress—those "providing for equal rights"—plainly negates the notion that jurisdiction over *all* statutory claims had already been conferred by the preceding reference to constitutional claims. Pp. 612–615.

(b) Section 1983 is not a statute that secures "equal rights" or "civil rights" within the meaning of § 1343. One cannot go into court and claim "a violation of § 1983," for § 1983 by itself does not protect anyone against anything, but simply provides a remedy. While § 1983, when properly invoked, satisfies the first requirement of § 1343 (3) that the civil action be "authorized by law," it cannot satisfy the second requirement that the action be one to redress the deprivation of rights "secured by the Constitution of the United States or by an Act of Congress providing for equal rights." Since § 1983 does not provide any substantive rights at all, it is not a statute "providing for the protection of civil rights, including the right to vote" within the meaning of § 1343 (4), and, moreover, to construe § 1343 (4) as encompassing all federal statutory suits would be plainly inconsistent with the congressional intent in passing that statute to ensure federal-court jurisdiction over authorized suits by the Attorney General against conspiracies to deprive individuals of certain enumerated rights. Pp. 615–620.

(c) Section 1343 does not confer federal jurisdiction over claims based on the Social Security Act, since that Act is not a statute securing

"equal rights" within § 1343 (3) or "civil rights" within § 1343 (4). While the provisions of the Act at issue here, to the extent that they prescribe a minimum level of subsistence for all individuals, might be regarded as securing either "equal rights" or "civil rights," these terms have a more restrictive meaning as used in § 1343. Pp. 620–623.

No. 77–5324, 560 F. 2d 160, affirmed; No. 77–719, 555 F. 2d 1219, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, and REHNQUIST, JJ., joined. POWELL, J., filed a concurring opinion, in which BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 623. WHITE, J., filed an opinion concurring in the judgment, *post*, p. 646. STEWART, J., filed a dissenting opinion, in all but n. 2 of which BRENNAN and MARSHALL, JJ., joined, *post*, p. 672. BRENNAN and MARSHALL, JJ., filed a separate statement, *post*, p. 676.

David H. Young, Assistant Attorney General of Texas, argued the cause for petitioners in No. 77–719. With him on the brief were *John L. Hill*, Attorney General, *David M. Kendall*, First Assistant Attorney General, and *Steve Bickerstaff*, Assistant Attorney General. *Theodore A. Gardner* argued the cause and filed briefs for petitioner in No. 77–5324.

Jeffrey J. Skarda argued the cause for respondents in No. 77–719. With him on the briefs were *Henry A. Freedman*, *Michael B. Trister*, and *John Williamson*. *Stephen Skillman*, Assistant Attorney General of New Jersey, argued the cause for respondents in No. 77–5324. With him on the brief were *John J. Degnan*, Attorney General, and *Richard M. Hluchan*, Deputy Attorney General.†

MR. JUSTICE STEVENS delivered the opinion of the Court.

The United States District Courts have jurisdiction over civil actions claiming a deprivation of rights secured by the Constitution of the United States or by Acts of Congress pro-

†Briefs of *amici curiae* urging affirmance in No. 77–719 were filed by *Solicitor General McCree* and *Sara Sun Beale* for the United States; and by *Robert B. O'Keefe* for East Texas Legal Services, Inc.

Ronald Y. Amemiya, Attorney General, and *Michael A. Lilly* and

viding for equal rights or for the protection of civil rights, including the right to vote.[1] The question presented by these cases is whether that jurisdiction encompasses a claim that a state welfare regulation is invalid because it conflicts with the Social Security Act. We conclude that it does not.

In the Social Security Amendments of 1967, Congress authorized partial federal funding of approved state programs providing emergency assistance for certain needy persons.[2] In February 1976, Julia Gonzalez, the petitioner in No. 77–5324, requested the Hudson County, N. J., Welfare Board to pay her $163 in emergency assistance funds to cover her rent and utility bills.[3] The Board denied her request because

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Charleen M. Aina, Deputy Attorneys General, filed a brief for the State of Hawaii as *amicus curiae* in No. 77–719.

[1] "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

. . . . . .

"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

"(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote." 28 U. S. C. §§ 1343 (3) and (4).

Jurisdiction under § 1343 (4), it should be noted, is not limited to actions against state officials or individuals acting under color of state law.

[2] § 206, 81 Stat. 893; see 42 U. S. C. § 606 (e)(1). The program is fully described in *Quern* v. *Mandley*, 436 U. S. 725.

[3] "[Petitioner] resides with her two children in Jersey City, New Jersey. Each month, she receives $235.00 under the Aid to Families with Dependent Children program (AFDC), 42 U. S. C. § 601 *et seq.*, as well as $157.00 under the Social Security Administration's disability program for her one retarded son. On February 2, 1976, Gonzalez received and cashed both checks at a neighborhood food market. Upon leaving the store, she was accosted by a robber who stole the cash. The following day she explained her situation to the Hudson County Welfare Board, request-

petitioner and her children were not "in a state of homelessness" as required by the relevant New Jersey regulations.[4]

Petitioner brought suit in the United States District Court for the District of New Jersey alleging that the emergency payment was "necessary to avoid destitution" within the meaning of § 406 (e)(1) of the federal Social Security Act,[5] and she was therefore entitled to the payment notwithstanding the more stringent New Jersey regulation. In her federal complaint she sought damages of $163 and an injunction

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ing $163.00 in emergency assistance funds to cover her rent and utility bills." 560 F. 2d 160, 163 (CA3 1977).

[4] "When because of an emergent situation over which they have had no control or opportunity to plan in advance, the eligible unit is in a state of homelessness; and the County Welfare Board determines that the providing of shelter and/or food and/or emergency clothing, and/or minimum essential house furnishings are necessary for health and safety, such needs may be recognized in accordance with the regulations and limitations in the following sections." N. J. Admin. Code § 10:82–5.12 (1976).

[5] Section 406 (e)(1), as set forth in 42 U. S. C. § 606 (e)(1), provides:

"The term 'emergency assistance to needy families with children' means any of the following, furnished for a period not in excess of 30 days in any 12-month period, in the case of a needy child under the age of 21 who is (or, within such period as may be specified by the Secretary, has been) living with any of the relatives specified in subsection (a)(1) of this section in a place of residence maintained by one or more of such relatives as his or their own home, but only where such child is without available resources, the payments, care, or services involved are necessary to avoid destitution of such child or to provide living arrangements in a home for such child, and such destitution or need for living arrangements did not arise because such child or relative refused without good cause to accept employment or training for employment—

"(A) money payments, payments in kind, or such other payments as the State agency may specify with respect to, or medical care or any other type of remedial care recognized under State law on behalf of, such child or any other member of the household in which he is living, and

"(B) such services as may be specified by the Secretary;

"but only with respect to a State whose State plan approved under section 602 of this title includes provision for such assistance."

commanding the New Jersey Welfare Director to conform his administration of the State's emergency assistance program to federal statutory standards. In essence, petitioner claimed that the New Jersey officials had deprived her of a right to emergency assistance protected by § 406 (e)(1) of the Social Security Act.

The District Court held that the complaint stated a claim under 42 U. S. C. § 1983.[6] Without deciding whether the "secured by the Constitution" language in § 1343 (3) should be construed to include Supremacy Clause claims,[7] the District Court concluded that it had jurisdiction under both subparagraphs (3) and (4) of § 1343. But in doing so, the court did not explain whether it was § 1983 or § 406 (e)(1) of the Social Security Act that it viewed as the Act of Congress securing "equal rights" or "civil rights." On the merits, the District Court found no conflict between the state regulation and the federal statute and entered summary judgment for respondents.

The Court of Appeals for the Third Circuit did not address the merits because it concluded that the District Court should have dismissed the complaint for want of jurisdiction.[8] In

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[6] 418 F. Supp. 566, 569 (1976).

Section 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[7] Article VI, cl. 2, of the United States Constitution provides:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

[8] 560 F. 2d, at 169.

reaching this conclusion, the Court of Appeals first noted that § 1983 "is not a jurisdictional statute; it only fashions a remedy." 560 F. 2d 160, 164 (1977). Nor could jurisdiction be founded on 28 U. S. C. § 1331,[9] the general federal-question jurisdictional statute, since the amount in controversy did not exceed $10,000. The court recognized that when a constitutional claim is of sufficient substance to support federal jurisdiction, a district court has power to consider other claims which might not provide an independent basis for federal jurisdiction.[10] But it concluded that the constitutional claim must involve more than a contention that the Supremacy Clause requires that a federal statute be given effect over conflicting state law. It then went on to hold that the Social Security Act is not an Act of Congress securing either "equal rights" or "civil rights" as those terms are used in § 1343. And those terms, the court concluded, limit the grant of federal jurisdiction conferred by § 1343 even if § 1983 creates a remedy for a broader category of statutory claims.

The petitioners in No. 77–719 are Commissioners of the Texas Department of Human Resources, which administers the State's program of Aid to Families with Dependent Children (AFDC). Respondents represent a class of AFDC recipients who share living quarters with a nondependent relative. Under the Texas regulations, the presence in the household of a nondependent person results in a reduction in the level of payments to the beneficiaries even if their level of actual need is unchanged. In a suit brought in the United

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[9] Section 1331 (a) provides:

"The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States, except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity."

[10] See, *e. g.*, *King* v. *Smith*, 392 U. S. 309; *Townsend* v. *Swank*, 404 U. S. 282.

States District Court for the Southern District of Texas, respondents claimed that the Texas regulations violate § 402 (a)(7) of the Social Security Act, 42 U. S. C. § 602 (a)(7), and the federal regulations promulgated pursuant thereto.[11]

The District Court upheld the Texas regulations.[12] While respondents' appeal was pending, this Court decided *Van Lare* v. *Hurley*, 421 U. S. 338. On the authority of that case, the Court of Appeals for the Fifth Circuit reversed.[13] Following earlier Fifth Circuit cases, the Court of Appeals concluded that federal jurisdiction was conferred by the language in 28 U. S. C. § 1343 (4) describing actions seeking relief "under any Act of Congress providing for the protection of civil rights . . . ." The court reasoned that statutory rights concerning food and shelter are " 'rights of an essentially personal nature,' " *Houston Welfare Rights Org.* v. *Vowell*, 555 F. 2d 1219, 1221 n. 1 (1977); that 42 U. S. C. § 1983 provides a remedy which may be invoked to protect such rights; and that § 1983 is an Act of Congress providing for the protection of civil rights within the meaning of that jurisdictional grant.[14]

We granted certiorari to resolve the conflict between that conclusion and the holding of the Third Circuit in No. 77–5324. 434 U. S. 1061. We have previously reserved the jurisdictional question we decide today, see *Hagans* v. *Lavine*, 415 U. S. 528, 533–534, n. 5. We preface our decision with a review of the history of the governing statutes.

I

Our decision turns on the construction of the two jurisdictional provisions, 28 U. S. C. §§ 1343 (3) and (4), and their

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[11] 45 CFR, §§ 233.20 (a)(3)(ii)(C), 233.90 (a) (1974).

[12] *Houston Welfare Rights Org.* v. *Vowell*, 391 F. Supp. 223 (1975).

[13] *Houston Welfare Rights Org.* v. *Vowell*, 555 F. 2d 1219 (1977).

[14] It will be noted that the Court of Appeals did not hold that the Social Security Act was itself an Act of Congress of the kind described in the jurisdictional statute.

interrelationship with 42 U. S. C. § 1983 and the Social Security Act. As in all cases of statutory construction, our task is to interpret the words of these statutes in light of the purposes Congress sought to serve.

Section 1 of the Civil Rights Act of 1871 is the source of both the jurisdictional grant now codified in 28 U. S. C. § 1343 (3) and the remedy now authorized by 42 U. S. C. § 1983.[15] Section 1 authorized individual suits in federal court to vindicate the deprivation, under color of state law, "of any rights, privileges, or immunities secured by the Constitution of the United States." No authorization was given for suits based on any federal statute.

In 1874, Congress enacted the Revised Statutes of the United States. At that time, the remedial and jurisdictional provisions of § 1 were modified and placed in separate sections. The words "and laws," as now found in § 1983, were included in the remedial provision of Rev. Stat. § 1979,[16] and two quite

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[15] The first section of *"An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes"* reads as follows:

"That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled 'An Act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication'; and the other remedial laws of the United States which are in their nature applicable in such cases." 17 Stat. 13.

[16] "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be sub-

different formulations of the jurisdictional grant were included in Rev. Stat. §§ 563 and 629. The former granted the district courts jurisdiction of all actions to redress a deprivation under color of state law of any right secured by the Constitution or "by any law of the United States." [17] The latter defined the jurisdiction of the circuit courts and included the limiting phrase—"by any law providing for equal rights"—which is now found in § 1343 (3). [18]

In the Judicial Code of 1911, Congress abolished circuit courts and transferred their authority to the district courts.[19] The Code's definition of the jurisdiction of the district courts to redress the deprivation of civil rights omitted the broad language referring to "any law of the United States" which had defined district court jurisdiction under § 563, and provided instead for jurisdiction over claims arising under federal laws "providing for equal rights"—the language which had been used to describe circuit court jurisdiction under § 629,

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jected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." Rev. Stat. § 1979.

[17] Subparagraph "Twelfth" of § 563 authorized district court jurisdiction "[o]f all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, ordinance, regulation, custom, or usage of any State, of any right, privilege, or immunity secured by the Constitution of the United States, or of any right secured by any law of the United States to persons within the jurisdiction thereof."

[18] Subparagraph "Sixteenth" of § 629 granted the circuit courts original jurisdiction "[o]f all suits authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage of any State, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States."

[19] 36 Stat. 1087, 1167.

and which is now a part of § 1343 (3).[20] No significant change in either the remedial or jurisdictional language has been made since 1911.[21]

Subsection 4 of § 1343, providing jurisdiction for claims "under any Act of Congress providing for the protection of civil rights, including the right to vote," is of more recent origin. Part III of the Civil Rights Act of 1957, as proposed, authorized the Attorney General to institute suits for injunctive relief against conspiracies to deprive citizens of the civil rights specified in 42 U. S. C. § 1985, which includes voting rights.[22] Part III conferred jurisdiction on the United States district courts to entertain proceedings instituted pursuant to this section of the Act.[23] While the substantive authorization of suits by the Attorney General was defeated, the amendment of § 1343, which had been termed a technical amendment to comply with the authority conferred by Part III,[24] was enacted into law.

With the exception of this most recent enactment, the legislative history of the provisions at issue in these cases ultimately provides us with little guidance as to the proper resolution of the question presented here. Section 1 of the 1871 Act was the least controversial provision of that Act; [25]

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[20] See § 24 (14), 36 Stat. 1092.

[21] The sections have, of course, been renumbered.

[22] H. R. 6127, § 121, 85th Cong., 1st Sess. (1957).

[23] *Ibid.* In addition to conferring federal jurisdiction, the bill also provided that such suits should be entertained without regard to exhaustion by the aggrieved party of administrative or other judicial remedies.

[24] See H. R. Rep. No. 291, 85th Cong., 1st Sess., 11 (1957) ("Section 122 amends section 1343 of title 28, United States Code. These amendments are merely technical amendments to the Judicial Code so as to conform it with amendments made to existing law by the preceding section of the bill").

[25] The Act of 1871, known as the Ku Klux Klan Act, was directed at the organized terrorism in the Reconstruction South led by the Klan, and the unwillingness or inability of state officials to control the widespread violence. Section 1 of the Act generated the least concern; it merely

and what little debate did take place as to § 1 centered largely on the question of what protections the Constitution in fact afforded.[26] The relevant changes in the Revised Statutes were adopted virtually without comment, as was the definition of civil rights jurisdiction in the 1911 Code. The latter provision was described as simply merging the existing jurisdiction of the district and circuit courts,[27] a statement which may be read either as reflecting a view that the broader "and laws" language was intended to be preserved in the more limited "equal rights" language or as suggesting that "and laws" was itself originally enacted with reference to laws providing for equal rights, and was never thought to be any broader.

Similar ambiguity is found in discussions of the basic policy of the legislation. While there is weight to the claim that Congress, from 1874 onward, intended to create a broad right of action in federal court for deprivations by a State of any federally secured right, it is also clear that the prime focus of Congress in all of the relevant legislation was ensuring a right of action to enforce the protections of the Fourteenth Amendment and the federal laws enacted pursuant thereto.

We cannot say that any of these arguments is ultimately

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added civil remedies to the criminal penalties imposed by the 1866 Civil Rights Act. See Cong. Globe, 42d Cong., 1st Sess., 568 (1871) (remarks of Sen. Edmunds); *id.*, at App. 68 (remarks of Rep. Shellabarger). The focus of the heated debate was on the succeeding sections of the Act, which included provisions imposing criminal and civil penalties for conspiracies to deprive individuals of constitutional rights, and authorizing the President to suspend the writ of habeas corpus and use armed forces to suppress "insurrection." §§ 2–5, 17 Stat. 13; see Cong. Globe, 42d Cong., 1st Sess., App. 220 (1871) (remarks of Sen. Thurman). See generally Developments in the Law—Section 1983 and Federalism, 90 Harv. L. Rev. 1133, 1153–1156 (1977).

[26] See Cong. Globe, 42d Cong., 1st Sess., 577 (1871) (remarks of Sen. Trumbull); Developments, *supra* n. 25, at 1155.

[27] See S. Rep. No. 388, 61st Cong., 2d Sess., pt. 1, p. 15 (1910); H. R. Doc. No. 783, 61st Cong., 2d Sess., pt. 1, p. 19 (1910).

right or wrong, or that one policy is more persuasive than others in reflecting the intent of Congress. It may well be that, at least as to § 1343 (3), the Congresses that enacted the 1871 Act and its subsequent amendments never considered the question of federal jurisdiction of claims arising under the broad scope of federal substantive authority that emerged many years later. This does not mean that jurisdiction cannot be found to encompass claims nonexistent in 1871 or 1874, but it cautions us to be hesitant in finding jurisdiction for new claims which do not clearly fit within the terms of the statute.[28]

II

The statutory language suggests three different approaches to the jurisdictional issue. The first involves a consideration of the words "secured by the Constitution of the United States" as used in § 1343. The second focuses on the remedy authorized by § 1983 and raises the question whether that section is a statute that secures "equal rights" or "civil rights" within the meaning of § 1343. The third approach makes the jurisdictional issue turn on whether the Social Security Act is a statute that secures "equal rights" or "civil rights." We consider these approaches in turn.

1. *The Supremacy Clause*

Under § 1343 (3), Congress has created federal jurisdiction of any civil action authorized by law to redress the deprivation under color of state law "of any right, privilege or immunity secured [1] by the Constitution of the United States or [2] by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United

[28] This caution is also mandated by the settled rule that the party claiming that a court has power to grant relief in his behalf has the burden of persuasion on the jurisdictional issue, *McNutt* v. *General Motors Acceptance Corp.*, 298 U. S. 178, 189, especially when he is proceeding in a court of limited jurisdiction. *Turner* v. *Bank of North America*, 4 Dall. 8, 11.

States." Claimants correctly point out that the first prepositional phrase can be fairly read to describe rights secured by the Supremacy Clause. For even though that Clause is not a source of any federal rights, it does "secure" federal rights by according them priority whenever they come in conflict with state law.[29] In that sense all federal rights, whether created by treaty, by statute, or by regulation, are "secured" by the Supremacy Clause.

In *Swift & Co.* v. *Wickham,* 382 U. S. 111, the Court was confronted with an analogous choice between two interpretations of the statute defining the jurisdiction of three-judge district courts.[30] The comprehensive language of that statute, 28 U. S. C. § 2281 (1970 ed.),[31] could have been broadly read to

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[29] "The argument that the phrase in the statute 'secured by the Constitution' refers to rights 'created,' rather than 'protected' by it, is not persuasive. The preamble of the Constitution, proclaiming the establishment of the Constitution in order to 'secure the Blessings of Liberty,' uses the word 'secure' in the sense of 'protect' or 'make certain.' That the phrase was used in this sense in the statute now under consideration was recognized in *Carter* v. *Greenhow,* 114 U. S. 317, 322, where it was held as a matter of pleading that the particular cause of action set up in the plaintiff's pleading was in contract and was not to redress deprivation of the 'right secured to him by that clause of the Constitution' [the contract clause], to which he had 'chosen not to resort.' See, as to other rights protected by the Constitution and hence secured by it, brought within the provisions of R. S. § 5508, *Logan* v. *United States,* 144 U. S. 263; *In re Quarles and Butler,* 158 U. S. 532; *United States* v. *Mosley,* 238 U. S. 383." *Hague* v. *CIO,* 307 U. S. 496, 526–527 (opinion of Stone, J.).

[30] The three-judge court statute, including the language at issue in *Swift & Co.* v. *Wickham,* was originally enacted in 1910, 36 Stat. 557, at a time when the Judicial Code of 1911 was under active consideration.

[31] When *Swift & Co.* was decided, § 2281 provided:

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof

encompass statutory claims secured by the Supremacy Clause or narrowly read to exclude claims that involve no federal constitutional provision except that Clause. After acknowledging that the broader reading was consistent not only with the statutory language but also with the policy of the statute, the Court accepted the more restrictive reading. Its reasoning is persuasive and applicable to the problems confronting us in this case.

> "This restrictive view of the application of § 2281 is more consistent with a discriminating reading of the statute itself than is the first and more embracing interpretation. The statute requires a three-judge court in order to restrain the enforcement of a state statute 'upon the ground of the unconstitutionality of such statute.' Since all federal actions to enjoin a state enactment rest ultimately on the Supremacy Clause, the words 'upon the ground of the unconstitutionality of such statute' would appear to be superfluous unless they are read to exclude some types of such injunctive suits. For a simple provision prohibiting the restraint of the enforcement of any state statute except by a three-judge court would manifestly have sufficed to embrace every such suit whatever its particular constitutional ground. It is thus quite permissible to read the phrase in question as one of limitation, signifying a congressional purpose to confine the three-judge court requirement to injunction suits depending directly upon a substantive provision of the Constitution, leaving cases of conflict with a federal statute (or treaty) to follow their normal course in a single-judge court." *Swift & Co.* v. *Wickham, supra,* at 126–127 (footnotes omitted).

Just as the phrase in § 2281—"upon the ground of the

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upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title." (Emphasis added.)

unconstitutionality of such statute"—would have been superfluous unless read as a limitation on three-judge-court jurisdiction, so is it equally clear that the entire reference in § 1343 (3) to rights secured by an Act of Congress would be unnecessary if the earlier reference to constitutional claims embraced those resting solely on the Supremacy Clause. More importantly, the additional language which describes a limited category of Acts of Congress—those "providing for equal rights of citizens"—plainly negates the notion that jurisdiction over *all* statutory claims had already been conferred by the preceding reference to constitutional claims.

Thus, while we recognize that there is force to claimants' argument that the remedial purpose of the civil rights legislation supports an expansive interpretation of the phrase "secured by the Constitution," it would make little sense for Congress to have drafted the statute as it did if it had intended to confer jurisdiction over every conceivable federal claim against a state agent. In order to give meaning to the entire statute as written by Congress, we must conclude that an allegation of incompatibility between federal and state statutes and regulations does not, in itself, give rise to a claim "secured by the Constitution" within the meaning of § 1343 (3).

2. *Section 1983*

Claimants next argue that the "equal rights" language of § 1343 (3) should not be read literally or, if it is, that § 1983, the source of their asserted cause of action, should be considered an Act of Congress "providing for equal rights" within the meaning of § 1343 (3) or "providing for the protection of civil rights" within § 1343 (4). In support of this position, they point to the common origin of §§ 1983 and 1343 (3) in the Civil Rights Act of 1871 and this Court's recognition that the latter is the jurisdictional counterpart of the former.[32]

[32] See *Lynch* v. *Household Finance Corp.*, 405 U. S. 538, 540, 543; *Examining Board* v. *Flores de Otero*, 426 U. S. 572, 583.

Since broad language describing statutory claims was used in both provisions during the period between 1874 and 1911 and has been retained in § 1983, and since Congress in the Judicial Code of 1911 purported to be making no changes in the existing law as to jurisdiction in this area, the "equal rights" language of § 1343 (3) must be construed to encompass all statutory claims arising under the broader language of § 1983. Moreover, in view of its origin in the Civil Rights Act of 1871 and its function in modern litigation, § 1983 does "provid[e] for the protection of civil rights" within the meaning of § 1343 (4).

In practical effect, this argument leads to the same result as claimants' Supremacy Clause argument: jurisdiction over all challenges to state action based on any federal ground. Although the legislative history does not forbid this result, the words and structure of the statute, as well as portions of the legislative history, support a more limited construction.

The common origin of §§ 1983 and 1343 (3) unquestionably implies that their coverage is, or at least originally was, coextensive. It is not, however, necessary in this case to decide whether the two provisions have the same scope. For even if they do, there would still be the question whether the "and laws" language in § 1983 should be narrowly read to conform with the "equal rights" language in § 1343 (3), or, conversely, the latter phrase should be broadly read to parallel the former. And, in all events, whether or not we assume that there is a difference between "any law of the United States" on the one hand and "any Act of Congress providing for equal rights" on the other, the fact is that the more limited language was used when Congress last amended the jurisdictional provision. In order to construe the broad language of § 1983 to cover any statutory claim, and at the same time to construe the language of § 1343 (3) as coextensive with such a cause of action, it would be necessary to ignore entirely Congress' most recent limiting amendment and the words of the provision as currently in force.

We cannot accept claimants' argument that we should reach this result by holding that § 1983 is an Act of Congress "providing for equal rights" within the meaning of § 1343 (3). Unlike the 1866 and 1870 Acts,[33] § 1 of the Civil Rights Act of 1871 did not provide for any substantive rights—equal or otherwise. As introduced and enacted, it served only to ensure that an individual had a cause of action for violations of the Constitution, which in the Fourteenth Amendment embodied and extended to all individuals as against state action the substantive protections afforded by § 1 of the 1866 Act.[34] No matter how broad the § 1 cause of action may be, the breadth of its coverage does not alter its procedural character. Even if claimants are correct in asserting that § 1983 provides a cause of action for all federal statutory claims, it remains true that one cannot go into court and claim a "violation of § 1983"—for § 1983 by itself does not protect anyone against anything. As Senator Edmunds recognized in the 1871 debate: "All civil suits, as every lawyer understands, which this act authorizes, are not based upon it;

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[33] The Act of April 9, 1866, 14 Stat. 27, the forerunner to the Fourteenth Amendment, in its first section declared all persons born in the United States to be citizens and provided that all citizens should have the same rights to make and enforce contracts, to sue, to purchase, lease, sell, or hold property, and to full and equal benefit of all laws as is enjoyed by white citizens. The Act of May 31, 1870, 16 Stat. 140, which followed the passage of the Fifteenth Amendment, was directed at enforcing the declared right of every citizen to vote in all elections without regard to race.

[34] Indeed, the view that § 1 of the 1871 Act was "merely carrying out the principles of the civil rights bill [of 1866] which have since become a part of the Constitution" may well explain why it was subject to the least debate of any section of that Act. Cong. Globe, 42d Cong., 1st Sess., 568 (1871) (remarks of Sen. Edmunds). See also *id.*, at 429 (remarks of Rep. McHenry). Section 1 of the 1871 Act was modeled after § 2 of the 1866 Act, which provided criminal sanctions for violations of the rights declared by that Act.

they are based upon the right of the citizen. The act only gives a remedy." [35]

Under § 1343 (3), a civil action must be both "authorized by law" and brought to redress the deprivation of rights "secured by the Constitution of the United States or by any Act of Congress providing for equal rights." Section 1983, when properly invoked, satisfies the first requirement: It ensures that the suit will not be dismissed because not "authorized by law." But it cannot satisfy the second, since by its terms, as well as its history, it does not provide any rights at all.

We reach a similar conclusion with respect to the argument that § 1983 is a statute "providing for the protection of civil rights, including the right to vote." Standing alone, § 1983 clearly provides no protection for civil rights since, as we have just concluded, § 1983 does not provide any substantive rights at all. To be sure, it may be argued that § 1983 does in some sense "provid[e] for the protection of civil rights" when it authorizes a cause of action based on the deprivation of civil rights guaranteed by other Acts of Congress. But in such cases, there is no question as to jurisdiction, and no need to invoke § 1983 to meet the "civil rights" requirement of § 1343 (4); the Act of Congress which is the actual substantive basis of the suit clearly suffices to meet the requisite test.[36] It is only when the underlying statute is *not* a civil rights Act that § 1983 need be invoked by those in claimants' position to support jurisdiction. And in such cases, by hypothesis, § 1983 does not "provid[e] for the protection of civil rights."

To construe § 1343 (4), moreover, as encompassing all federal statutory suits, as claimants here propose, would seem plainly inconsistent with the congressional intent in passing that statute. As noted earlier, the provision's primary pur-

[35] Cong. Globe, 42d Cong., 1st Sess., 568 (1871). See also 560 F. 2d, at 169.

[36] Where the underlying right is based on the Constitution itself, rather than an Act of Congress, § 1343 (3) obviously provides jurisdiction.

pose was to ensure federal-court jurisdiction over suits which the bill authorized the Attorney General to bring against conspiracies to deprive individuals of the civil rights enumerated in 42 U. S. C. § 1985.[37] The statute, of course, is broader than that: It encompasses suits brought by private individuals as well, and thus retained some significance even after the provisions authorizing suit by the Attorney General were defeated. But to the extent that § 1343 (4) was thought to expand existing federal jurisdiction, it was only because it does not require that the claimed deprivation be "under color of any State law." [38] One would expect that if Congress sought

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[37] See H. R. Rep. No. 291, 85th Cong., 1st Sess., 10 (1957):

"Section 1985 of title 42, United States Code, often referred to as the Ku Klux Act, provides a civil remedy in damages to a person damaged as a result of conspiracies to deprive one of certain civil rights. The law presently is comprised of three subsections; the first establishes liability for damages against any person who conspires to interfere with an officer of the United States in the discharge of his duties and as a result thereof injures or deprives another of rights or privileges of a citizen of the United States; the second subsection establishes liability for damages against any person who conspires to intimidate or injure parties, witnesses, or jurors involved in any court matter or who conspires to obstruct the due process of justice in any State court made with the intent to deny to any citizen the equal protection of the laws as the result of the conspiracies for injury or deprivation of another's rights or privileges as a citizen of the United States; the third subsection establishes liability for damages against any person who conspires to deprive another of equal protections of the laws or of equal privileges and immunities under the laws, or of the right to vote in elections affecting Federal offices if the result is to injure or deprive another of rights and privileges of a citizen of the United States.

"The effect of the provisions of the proposed bill on existing law as contained in title 42, United States Code, section 1985 is not to expand the rights presently protected but merely to provide the Attorney General with the right to bring a civil action or other proper proceeding for relief to prevent acts or practices which would give rise to a cause of action under the three existing subsections."

[38] See 103 Cong. Rec. 12559 (1957) (remarks of Sen. Case):

"My intent in proposing the idea of leaving in the bill section 122, re-

not only to eliminate any state-action requirement but also to allow jurisdiction without respect to the amount in controversy for claims which in fact have nothing to do with "civil rights," there would be some indication of such an intent. But there is none, either in the legislative history or in the words of the statute itself.

3. *The Social Security Act*

It follows from what we have said thus far that § 1343 does not confer federal jurisdiction over the claims based on the Social Security Act unless that Act may fairly be characterized as a statute securing "equal rights" within § 1343 (3) or "civil rights" within § 1343 (4). The Social Security Act provisions at issue here authorize federal assistance to participating States in the provision of a wide range of monetary benefits to needy individuals, including emergency assistance and payments necessary to provide food and shelter. Arguably, a statute that is intended to provide at least a minimum level of subsistence for all individuals could be regarded as securing either "equal rights" or "civil rights." [39] We are persuaded,

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numbered as section 121, was to strengthen the so-called right to vote. The section would amend existing law so as to clarify the jurisdiction of the district courts in the entertainment of suits to recover damages, or to secure equitable or other relief under any act of Congress providing for the protection of civil rights, including the right to vote. . . .

. . . . . .

"[T]he addition of a subparagraph 4 in section 1343 is not limited by the clause 'under color of any statute, ordinance, regulation, custom, or order of any State or Territory,' to which the preceding paragraph is subject.

"So in that sense the new subparagraph 4, which would be left in Part III, is complementary to, and is perhaps somewhat broader than existing law. So it does not limit the suit to recover damages to a case in which the injury occurs under color of law."

[39] Cf. *Gomez* v. *Florida State Employment Service*, 417 F. 2d 569, 580 n. 39 (CA5 1969) (rights secured by the Social Security Act are "rights of an essentially personal nature").

however, that both of these terms have a more restrictive meaning as used in the jurisdictional statute.

The Social Security Act does not deal with the concept of "equality" or with the guarantee of "civil rights," as those terms are commonly understood. The Congress that enacted § 1343 (3) was primarily concerned with providing jurisdiction for cases dealing with racial equality; the Congress that enacted § 1343 (4) was primarily concerned with providing jurisdiction for actions dealing with the civil rights enumerated in 42 U. S. C. § 1985, and most notably the right to vote. While the words of these statutes are not limited to the precise claims which motivated their passage,[40] it is inappropriate to read the jurisdictional provisions to encompass new claims which fall well outside the common understanding of their terms.

Our conclusion that the Social Security Act does not fall within the terms of either § 1343 (3) or (4) is supported by this Court's construction of similar phrases in the removal statute, 28 U. S. C. § 1443. The removal statute makes reference to "any law providing for the equal civil rights of citizens" and "any law providing for equal rights." In construing these phrases in *Georgia* v. *Rachel*, 384 U. S. 780, this Court concluded:

> "The present language 'any law providing for . . . equal civil rights' first appeared in § 641 of the Revised Statutes of 1874. When the Revised Statutes were compiled, the substantive and removal provisions of the Civil Rights Act of 1866 were carried forward in separate sections. Hence, Congress could no longer identify the rights for which removal was available by using the language of the original Civil Rights Act—'rights secured to them by the first section of this act.' The new

[40] As to § 1343 (4), see *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409, 412 n. 1 (Civil Rights Act of 1866); *Allen* v. *State Board of Elections*, 393 U. S. 544, 554 (Voting Rights Act of 1965).

language it chose, however, does not suggest that it intended to limit the scope of removal to rights recognized in statutes existing in 1874. On the contrary, Congress' choice of the open-ended phrase 'any law providing for . . . equal civil rights' was clearly appropriate to permit removal in cases involving 'a right under' both existing and future statutes that provided for equal civil rights.

"There is no substantial indication, however, that the general language of § 641 of the Revised Statutes was intended to expand the kinds of 'law' to which the removal section referred. In spite of the potential breadth of the phrase 'any law providing for . . . equal civil rights,' it seems clear that in enacting § 641, Congress intended in that phrase only to include laws comparable in nature to the Civil Rights Act of 1866. . . .

. . . . . .

". . . As the Court of Appeals for the Second Circuit has concluded, § 1443 'applies only to rights that are granted in terms of equality and not to the whole gamut of constitutional rights . . . .' 'When the removal statute speaks of "any law providing for equal rights," it refers to those laws that are couched in terms of equality, such as the historic and the recent equal rights statutes, as distinguished from laws, of which the due process clause and 42 U. S. C. § 1983 are sufficient examples, that confer equal rights in the sense, vital to our way of life, of bestowing them upon all.' *New York* v. *Galamison*, 342 F. 2d 255, 269, 271. See also *Gibson* v. *Mississippi*, 162 U. S. 565, 585–586; *Kentucky* v. *Powers*, 201 U. S. 1, 39–40; *City of Greenwood* v. *Peacock*, [384 U. S. 808,] 825." *Id.*, at 789–790, 792 (footnotes omitted).

In accord with *Georgia* v. *Rachel*,[41] the Courts of Appeals have

[41] The removal statute was enacted in the Civil Rights Act of 1866 under the authority of the Thirteenth Amendment; §§ 1343 (3) and (4),

consistently held that the Social Security Act is not a statute providing for "equal rights." See *Andrews* v. *Maher*, 525 F. 2d 113 (CA2 1975); *Aguayo* v. *Richardson*, 473 F. 2d 1090, 1101 (CA2 1973), cert. denied *sub nom. Aguayo* v. *Weinberger*, 414 U. S. 1146 (1974). We endorse those holdings, and find that a similar conclusion is warranted with respect to § 1343 (4) as well. See *McCall* v. *Shapiro*, 416 F. 2d 246, 249 (CA2 1969).

We therefore hold that the District Court did not have jurisdiction in either of these cases. Accordingly, the judgment in No. 77–5324 is affirmed, and the judgment in No. 77–719 is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, concurring.

I join the Court's opinion [1] and agree that it is not necessary in these cases to decide the meaning of the phrase "Constitution and laws" in 42 U. S. C. § 1983. See *ante*, at 616. MR. JUSTICE WHITE has taken a contrary view, however, and has concluded that because the statute now codified as § 1983 includes the words "and laws," it provides a private cause of action for the deprivation, under color of state law, of any federal statutory right. Anyone who ventures into the thicket of the legislative history of § 1983 quickly realizes that

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on the other hand, are based upon the authority of the Fourteenth Amendment which, unlike the Thirteenth Amendment, is not limited to racially based claims of inequality. As a result, while an Act of Congress must in fact deal with equal rights or civil rights to support jurisdiction under § 1343, it need not be stated only in terms of racial equality. Cf. *Georgia* v. *Rachel*, 384 U. S., at 792.

[1] I join MR. JUSTICE STEVENS' opinion for the Court on the understanding that it draws no conclusions about the legislative history of 28 U. S. C. § 1343 (3) beyond those necessary to support its rather narrow holding with respect to the scope of that statute. I do not necessarily agree with every observation in the Court's opinion concerning the history of the post-Civil War civil rights legislation.

there is no clearly marked path to the correct interpretation of this statute. Yet, there is sufficient evidence to indicate convincingly that the phrase "and laws" was intended as no more than a shorthand reference to the equal rights legislation enacted by Congress. Because I do not think MR. JUSTICE WHITE's interpretation can survive careful examination of the legislative history of § 1983, I write separately.

I

Section 1983 provides a private cause of action for the deprivation, under color of state law, of "rights . . . secured by the Constitution and laws." [2] An examination of the genesis of this statute makes clear the hazard of viewing too expansively the statute's broad reference to "laws." Pursuant to legislative direction, see Act of June 27, 1866, 14 Stat. 74, President Andrew Johnson appointed three distinguished jurists to constitute a commission to simplify, organize, and consolidate all federal statutes of a general and permanent nature. These revisers and their successors spent several years in producing the volume enacted by Congress as the Revised Statutes of 1874. See Dwan & Feidler, The Federal Statutes—Their History and Use, 22 Minn. L. Rev. 1008, 1012–1015 (1938). Section 1983 first appeared in its present form as § 1979 of the Revised Statutes,[3] which in turn was derived from § 1 of the Civil Rights Act of 1871, 17 Stat. 13. It was in the 1874 revision that the words "and laws" were added.

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[2] Title 42 U. S. C. § 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[3] Revised Stat. § 1979 is identical to 42 U. S. C. § 1983. For convenience, the former designation is used throughout most of this opinion.

The history of the revision makes abundantly clear that Congress did not intend the revision to alter the content of federal statutory law. The Act of Congress authorizing the revision discloses no warrant to do so. 14 Stat. 74. In reporting to the House on the progress of their task, the revisers advised that, while some changes in the wording of federal statutes were necessary, "[e]very essential provision of the existing laws must be reproduced, with such additions only by the [revisers] as shall give to these provisions their intended effect." Report of the Commissioners to Revise the Statutes of the United States, H. R. Misc. Doc. No. 31, 40th Cong., 3d Sess., 2 (1869). Before the work was approved by Congress, it was scrutinized, at the behest of a joint congressional committee, for nine months by Thomas Jefferson Durant, an attorney not involved in the initial drafting, for the express purpose of detecting changes and restoring the original meaning. See 2 Cong. Rec. 646 (1874) (remarks of Rep. Poland); *id.*, at 129 (remarks of Rep. Butler); Dwan & Feidler, *supra*, at 1013–1014. Thereafter it was reviewed by both the House Committee on Revision of the Laws, see 2 Cong. Rec. 646 (1874) (remarks of Rep. Poland), and by the House itself in a series of special evening sessions, see *infra*, at 638–639, for the purpose of making *"such changes and amendments as [are] necessary to make [sure] that it will be an exact transcript, an exact reflex, of the existing statute law of the United States—that there shall be nothing omitted and nothing changed."* 2 Cong. Rec. 646 (1874) (remarks of Rep. Poland) (emphasis added). Members of Congress who urged enactment of the revision into positive law stated unequivocally that no substantive changes were intended. For example, Senator Conkling, chairman of the Senate Committee on the Revision of the Laws, in reporting the revision to the Senate, said:

> "[A]lthough phraseology of course has been changed, the aim throughout has been to preserve absolute identity of

> meaning, not to change the law in any particular, however minute, but to present . . . the law in all its parts as it was actually found to exist dispersed through seventeen volumes of statutes." *Id.*, at 4220.[4]

In spite of these efforts, it may have been inevitable in an undertaking of such magnitude that changes in the language of some statutes arguably would alter their meaning. When confronted with such changes, we should remember the " 'familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.' " *Muniz* v. *Hoffman*, 422 U. S. 454, 469 (1975) (quoting *Holy Trinity Church* v. *United States*, 143 U. S. 457, 459 (1892)). I do not foreclose

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[4] Supporters in the House were equally emphatic in their assurances that no substantive changes were contained in the revision:

"I desire to premise here that [the House Committee on Revision of the Laws] felt it their bounden duty not to allow, so far as they could ascertain, any change of the law. This embodies the law as it is. The temptation, of course, was very great, where a law seemed to be imperfect, to perfect it by the alteration of words or phrases, or to make some change. But that temptation has, so far as I know and believe, been resisted. We have not attempted to change the law, in a single word or letter, so as to make a different reading or different sense. All that has been done is to strike out the obsolete parts and to condense and consolidate and bring together statutes *in pari materia;* so that you have here, except in so far as it is human to err, the laws of the United States under which we now live." 2 Cong. Rec. 129 (1873) (remarks of Rep. Butler, introducing H. R. 1215).

"[T]he committee have endeavored to have this revision a perfect reflex of the existing national statutes. We felt aware that if anything was introduced by way of change into those statutes it would be impossible that the thing should ever be carried through the House. In the multitude of matters that come before Congress for consideration, if we undertake to perfect and amend the whole body of the national statutes there is an end of any expectation that the thing would ever be carried through either House of Congress, and therefore the committee have endeavored to eliminate from this everything that savors of change in the slightest degree of the existing statutes." *Ibid.* (remarks of Rep. Poland).

the possibility that some statutory change attributable solely to the 1874 revision may be accepted at face value. See *United States* v. *Sischo*, 262 U. S. 165, 168–169 (1923). But certainly the better wisdom is that "an insertion [of language] in the Revised Statutes . . . is not lightly to be read as making a change . . . ." *Ibid.*

I therefore am unable to accept uncritically the view that merely because the phrase "and laws" was inserted into the predecessor of § 1983 during the revision, that statute henceforth must be read as embracing all federal rights. The presence of this addition merely launches the inquiry into the legislative intent behind the present wording of § 1983.[5]

II

A

The history of § 1983 begins with the Civil Rights Act of 1866, 14 Stat. 27. Section 1 of the Act guaranteed all citizens of the United States "the same right . . . to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property . . . as is enjoyed by white citizens." Section 2 made it a misdemeanor for any person, acting under color of state law, to deprive another of the rights enumerated in § 1. Jurisdiction over the criminal actions described in § 2, as well as over civil actions to enforce the rights granted in § 1, was provided by § 3, which stated in part:

> "[T]he district courts of the United States . . . shall have . . . cognizance . . . , concurrently with the circuit courts of the United States, of all causes, civil and crimi-

[5] Whatever value ordinarily lies in focusing exclusively on the "plain words [of the] civil rights legislation originating in the post-Civil War days," *post*, at 649, is certainly eclipsed by the need to examine carefully alterations produced by the revisers, whose congressionally mandated task was to preserve, not to change, the meaning of the federal statutes.

nal, affecting persons who are denied . . . any of the rights secured to them by the first section of this act . . . ."

The first three sections of the 1866 Act were the models for parts of two subsequent civil rights statutes. First, §§ 16 and 17 of the 1870 Civil Rights Act, 16 Stat. 144, were copied, with some changes, directly from §§ 1 and 2 of the 1866 Act,[6] and § 18 stated that §§ 16 and 17 were to "be enforced according to the provisions of said act"—*i. e.*, the jurisdictional provisions of § 3 of the 1866 law.[7] Second, § 1 of the Civil Rights Act of 1871, 17 Stat. 13, known as the Ku Klux Klan Act, was modeled after § 2 of the 1866 law. Rather than providing for criminal liability, however, it granted a private civil cause of action; and in place of the enumerated rights of § 1 of the 1866 Act, it encompassed the deprivation, under color of state law, of "any rights, privileges, or immunities secured by the Constitution of the United States." Concurrent circuit and district court jurisdiction over these civil actions was to be governed by § 3 of the 1866 Act, which again was incorporated by reference. Section 1 of the 1871 Act is the direct ancestor of § 1983.

The statutes discussed above were among the civil rights and related jurisdictional provisions in force when the task of producing the Revised Statutes was commenced. Of immediate concern, of course, is § 1 of the 1871 Act, which became § 1979 of the Revised Statutes and, finally, 42 U. S. C. § 1983. As that statute came to the revisers, it extended only to deprivations, under color of state law, of rights "secured by the Constitution." As it left their hands, this phrase had been

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[6] Section 16 of the 1870 Act repeated only some of the rights enumerated in § 1 of the 1866 Act, but these were granted to "all persons within the jurisdiction of the United States," rather than, as in the 1866 Act, to "citizens of the United States." For a discussion of § 17 of the 1870 Act, see Part III, *infra*.

[7] Section 18 of the 1870 Act also re-enacted in full the 1866 Act, incorporating it by reference.

altered to read "secured by the Constitution and laws." The problem is to discover whether the revisers and the Congress that accepted their work intended, by the addition of the two words "and laws," greatly to expand the coverage of the statute to encompass every federal statutory right. See *post*, at 654.

B

A primary source of information about the meaning of the Revised Statutes is a two-volume draft published by the revisers in 1872. Revision of the United States Statutes as Drafted by the Commissioners Appointed for that Purpose (1872) (hereinafter Draft). This Draft provides insight into the thinking of its authors in two ways: It contains marginal notations indicating the sources from which each section of the proposed text was derived, and it includes explanatory notes following some of the proposed provisions, discussing problems encountered by the revisers and justifying the use of particular word choices.[8]

As it appears in the Draft (and in the final text), § 1979 creates a cause of action for the deprivation of "rights . . . secured by the Constitution and laws." The only indication in the Draft concerning the language of § 1979 is the marginal notation showing that it was derived from § 1 of the 1871 Civil Rights Act. Although the revisers gave no direct explanation for their insertion of the reference to "laws," their reasons for that change are revealed by a close examination of similar modification made in the jurisdictional counterparts to § 1979.

As part of their general scheme of organizing the federal statutes, the revisers consolidated all the jurisdictional provisions of the Statutes at Large in the "Judiciary" title of the revision. As noted above, § 3 of the 1866 Act had been relied

[8] The final version of the Revised Statutes retains the marginal indications of the source of each section, but omits the explanatory notes. The final version contains limited cross-referencing; the Draft does not.

upon by Congress to provide concurrent jurisdiction in the district and circuit courts for the civil actions authorized by § 1979. As each of these courts was dealt with in separate chapters in the "Judiciary" title, the jurisdictional authority of § 3 was written into two separate provisions. One was § 563 (12), placed under the chapter dealing with the district courts; the counterpart in the chapter on circuit court jurisdiction was § 629 (16).[9] Both sections mirrored closely the language of § 1979, and the marginal notations for each indicated that both were derived from precisely the same source.[10]

In spite of this identity of origin and purpose, these two jurisdictional provisions contained a difference in wording. Section 563 (12) provided district court jurisdiction over civil actions brought to redress the deprivation, under color of state law, of rights secured by the Constitution, or "of any right secured by any law of the United States." Section 629 (16), by contrast, contained, in place of the latter phrase, the words "of any right secured by any law providing for equal rights." Fortunately, in including a reference to laws in § 629 (16), the revisers provided what they omitted in their drafts of §§ 563 (12) and 1979: a detailed and lengthy note explaining their reasons for going beyond the language of the prior civil rights statutes. 1 Draft 359. This note not only makes explicit the meaning of the words "any law providing for equal rights," it discloses the correct interpretation of the analogous language in §§ 563 (12) and 1979 as well.

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[9] The title, chapter, and section numbers used in the 1872 Draft differ from those employed in the final version adopted by Congress. For the sake of simplicity, however, the provisions of the Draft will be discussed under the numbers ultimately assigned in the 1874 revision.

[10] The marginal notations accompanying §§ 563 (12) and 629 (16) actually list three sources: § 1 of the 1871 Act, §§ 16 and 18 of the 1870 Act, and § 3 of the 1866 Act. As explained above, the relevant sections of the 1870 and 1871 legislation merely incorporated by reference the jurisdictional provisions originally written into § 3 of the 1866 Act. Section 3, then, was actually the sole source of both § 563 (12) and § 629 (16).

As part of a larger argument justifying some of the differences in language between § 629 (16) in the revision and § 3 of the 1866 Act,[11] the revisers' note makes an important statement concerning the relationship between the broad language of § 1 of the 1871 Act, from which § 1979 was taken, and the earlier statutes providing for specifically enumerated rights:

> "It may have been the intention of Congress to provide, by [§ 1 of the 1871 Act], for all the cases of [the enumerated] deprivations mentioned in [§ 16 of] the previous act of 1870, and thus actually to supersede the

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[11] As shown above, see *supra*, at 629–630, and n. 10, the terms of § 3 of the 1866 Act had been relied upon by Congress to provide jurisdiction for § 1 of the 1866 Act and § 16 of the 1870 Act, appearing in the revision as §§ 1977 and 1978, as well as for § 1979. The revisers therefore understood that the text in the revision representing § 3 had to provide jurisdiction over civil actions brought to enforce all of the rights covered by these three civil rights provisions.

Recognizing this, the revisers in their note first justify the language in § 629 (16) extending jurisdiction only over suits brought to "redress the deprivation" of certain rights. Section 3 of the 1866 Act had referred to actions "affecting persons" who had been denied certain rights. The revisers reasoned that Congress could not have meant the latter phrase literally, as this would have created concurrent circuit and district court jurisdiction over any action whatsoever—"for the recovery of lands, or on promissory notes, . . . or for the infringement of patent or copyrights," 1 Draft 361—by anyone who coincidentally had been denied his civil rights. The revisers therefore concluded that Congress meant to provide jurisdiction only over suits to *redress* the deprivation of civil rights.

The revisers sought support for this conclusion from the wording of § 1 of the 1871 Act which, although it had incorporated by reference the "affecting persons who are denied" jurisdictional language of § 3 of the 1866 Act, provided for civil liability against anyone who subjected another to the "deprivation" of rights secured by the Constitution. Accordingly, the revisers inferred Congress' wish that victims of civil rights violations should have access to the federal courts only to redress those violations, not to pursue all other kinds of litigation. It was at this point in their argument that the revisers made the statement quoted and discussed in the text below.

> indefinite provisions contained in that act.[12] But as it might perhaps be held that only such rights as are specifically secured by the Constitution, and not every right secured by a law authorized by the Constitution, were here intended, it is deemed safer to add a reference to the civil-rights act." [13] 1 Draft 362.

This passage reflects the revisers' understanding that Congress intended by its reference in § 1 of the 1871 Act to "rights . . . secured by the Constitution" to make unlawful the deprivation

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[12] The statement that the provisions of § 16 of the 1870 Act are "indefinite" apparently is a reference to the fact that § 16 was less definite than § 1 of the 1871 Act in demonstrating a congressional intent to limit federal jurisdiction to the redress of actual *deprivations* of federal rights. See n. 11, *supra*. Section 1 contained the definite phrase "*deprivation* of any rights . . . secured by the Constitution" (emphasis added), while § 16 merely stated that persons "shall have" certain rights.

[13] It is unclear why the revisers said that "any law providing for equal rights" is a reference to § 16 of the 1870 Civil Rights Act rather than to its predecessor, § 1 of the 1866 Act, or to civil rights Acts generally. The revisers' immediate focus on § 16 is perhaps explained by their apparent conclusion that that provision had superseded § 1 of the 1866 Act with respect to those rights mentioned in both places. As noted *supra*, at 628, and n. 6, § 16 introduced some changes in wording when it restated certain of the § 1 rights, and the § 16 version appeared in the revision as § 1977. Moreover, the marginal note to § 1977 lists only § 16 as its source.

The revisers did not believe that § 1 of the 1866 Act had been made entirely obsolete by § 16 of the 1870 Act, however, for § 1978 in the Draft consists of an enumeration of the § 1 rights not repeated in § 16: those dealing with the right to hold, purchase, and convey property. Accurately reflecting the text of § 1, these rights are extended only to "citizens of the United States." See n. 6, *supra*. The marginal note identifies § 1 as the source of § 1978.

Whatever their reasons for referring only to § 16 of the 1870 Act as an illustration of the rights § 1979 was thought to protect against infringement by those acting under color of state law, it is evident from the context of their discussion that the revisers were concerned generally with civil rights legislation enumerating particular rights as authorized by the recently adopted Fourteenth Amendment, and perhaps by the Thirteenth and Fifteenth as well.

under color of state law of any right enumerated in § 1 of the 1866 Act and § 16 of the 1870 Act. The revisers doubtless were aware that § 1 of the 1871 Act was intended by Congress as a legislative implementation of the first section of the Fourteenth Amendment, which in turn was intended to constitutionalize the enumerated rights of § 1 of the 1866 Act. See Gressman, The Unhappy History of Civil Rights Legislation, 50 Mich. L. Rev. 1323, 1329–1334 (1952); tenBroek, Thirteenth Amendment to the Constitution of the United States—Consummation to Abolition and Key to the Fourteenth Amendment, 39 Calif. L. Rev. 171, 200–202 (1951); *ante*, at 617, and n. 34. They therefore believed that § 1 of the 1866 Act, to the extent it protected against deprivations under color of state law, was meant to be fully encompassed by the phrase "rights . . . secured by the Constitution" in § 1 of the 1871 Act. But realizing that the courts likely would read this phrase restrictively, it was "deemed safer" to add to "rights . . . secured by the Constitution," as it appeared in § 629 (16), a second phrase—"or . . . secured by any law providing for equal rights"—as a shorthand reference to the civil rights legislation granting specified rights.[14]

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[14] This demonstrates that MR. JUSTICE STEVENS' opinion for the Court in these cases clearly is correct in its reading of the phrase "any Act of Congress providing for equal rights" in § 1343 (3). These words were chosen carefully to refer to legislation providing for equality in the enjoyment of civil rights and should not be construed more broadly than their plain meaning permits.

The revisers' reference to "every right secured by a law authorized by the Constitution" does not in any way indicate their belief that § 629 (16), by its reference to "any law providing for equal rights," would extend the courts' jurisdiction to every suit involving statutory rights of every kind. On the contrary, the revisers' note merely reflects their concern that, in general, courts would not interpret "rights secured by the Constitution" to extend to *any* federal statutory right. If this were the case, then even those rights originally created in the Civil Rights Acts—rights which had been understood by Congress, when drafting § 1 of the 1871 Act, to be "constitutional rights" because of their unique relationship with § 1 of the

Although § 563 (12) refers generally to "any law of the United States," it is manifest that the revisers intended §§ 563 (12) and 629 (16) to be identical in scope. The two provisions were derived from precisely the same sources in the Statutes at Large, see n. 10, *supra*, and there is no indication whatsoever that in separating the two the revisers intended to give them different meanings. Indeed, in the explanatory note to § 629 (16), the revisers made explicit their awareness that the problems confronting them with respect to circuit court jurisdiction applied equally to the district courts, since those two tribunals were to have identical, concurrent jurisdiction over all matters to which § 629 (16) extended. After explaining why § 3 of the 1866 Act, if taken literally, would greatly broaden federal jurisdiction, see n. 11, *supra*, the revisers stated:

> "[I]t can hardly be supposed that Congress designed, not only to open the doors of the *circuit courts* to these parties without reference to the ordinary conditions of citizenship and amount in dispute, but, in their behalf, to convert the *district courts* into courts of general common law and equity jurisdiction. It seems to be a reasonable construction, therefore, that instead of proposing an incidental but complete revolution in the character and functions of the *district courts*, as a measure of relief to parties who are elsewhere denied certain rights, Congress intended only to give a remedy in direct redress of that deprivation, and to allow that remedy to be sought in the courts of the United States." 1 Draft 361 (emphasis added).

It appears that two jurisdictional provisions were created simply because the revisers elected to write separate chapters for the district and circuit courts.

In light of these considerations, the difference in the wording of §§ 563 (12) and 629 (16) must be ascribed to oversight,

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Fourteenth Amendment—would not have been within the scope of §§ 1979, 629 (16), and 563 (12), absent the added reference to statutory law.

rather than to an intent to give the former provision greater scope than the latter.[15] Having ascertained that §§ 563 (12) and 629 (16) have the same scope, one can conclude only that the more restrictive language of § 629 (16) governs § 563 (12) as well, as the former was given more care and deliberation, and its language more precisely reflects the express understanding of the revisers.[16] It is understandable, therefore, that when the original jurisdiction of the circuit courts was eliminated in the Judicial Code of 1911, the more precisely drafted circuit court provision was chosen to replace the broader district court statute. It thus was § 629 (16) that became 28 U. S. C. § 1343 (3), a selection undoubtedly made by the drafters of the Judicial Code in recognition of the fact that this provision expresses more accurately the original intent of Congress than does § 563 (12). See Note, 72 Colum. L. Rev., *supra* n. 15, at 1423, and n. 152.

The fact that the revisers understood the words "any law" in § 563 (12) to refer only to the equal rights laws enacted by Congress necessarily illuminates the meaning of the similar, contemporaneously drafted reference in § 1979. The legisla-

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[15] See Note, Federal Jurisdiction Over Challenges to State Welfare Programs, 72 Colum. L. Rev. 1404, 1421–1423 (1972). The various subdivisions of the revision were assigned to different individuals for drafting. See Report of the Commissioners, S. Misc. Doc. No. 3, 42d Cong., 2d Sess., 1–2 (1871). It, therefore, is not surprising that different language should be used to express a single idea in statutes appearing in different parts of the revision.

In his separate opinion, MR. JUSTICE WHITE states that the Revised Statutes in other instances "provided different circuit and district court jurisdiction for causes which, prior to the revision, could be heard in either court." *Post*, at 669 n. 46. Whether or not the differences between district and circuit court jurisdiction to which he adverts were intended by the revisers, the issue here is what the evidence reveals regarding this particular difference between §§ 563 (12) and 629 (16). As I have shown, the history indicates that these two statutes were intended to be identical in scope.

[16] Accord, Note, 72 Colum. L. Rev., *supra* n. 15, at 1421–1423.

tive history shows unmistakably that the revisers drafted §§ 563 (12) and 629 (16) for the precise purpose of providing jurisdiction for actions brought under § 1979.[17] Just as the difference in wording between the two jurisdictional provisions is, in light of the historical evidence, not a persuasive reason for concluding that they differ in meaning, the variation between §§ 629 (16) and 1979 does not justify a construction that gives the latter a vastly broader scope than its jurisdictional counterpart. Indeed, only recently the Court decided in *Examining Board* v. *Flores de Otero*, 426 U. S. 572 (1976), that despite an unexplained difference in the language of §§ 1979 and 629 (16) that was introduced during the 1874 revision, these statutes must be construed as identical in scope.[18] 426 U. S., at 580–586. A similar approach to the language under scrutiny here is equally correct.

The explanatory note accompanying § 629 (16) makes perfectly clear that the revisers attributed to Congress the understanding that the particularly described rights of §§ 1977 and 1978 were protected against deprivation under color of state law by the words "rights . . . secured by the Constitution" in § 1979. Out of an abundance of caution, however, a

[17] In the final version of the revision, both § 563 (12) and § 629 (16) contain an explicit cross-reference to § 1979. In addition, the marginal notations in both the Draft and the final version of all three sections indicate the common origin discussed above. See *supra*, at 629–630, and n. 10.

[18] In *Examining Board* v. *Flores de Otero*, the Court concluded that the addition by the revisers of the words "or Territory" to § 1979, giving that statute application beyond the boundaries of the States of the Union, reflected the intent of Congress in light of such explicit evidence as Rev. Stat. § 1891, which provided: "The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect . . . in every Territory hereafter organized as elsewhere within the United States." Despite the fact that no reference to Territories of the United States was added to § 563 (12) or § 629 (16), the Court concluded that these provisions were intended to be identical in scope with § 1979. (The Court's opinion in *Flores de Otero* discusses these statutes mostly under their current section numbers, § 1983 and § 1343 (3).)

phrase was added to these words wherever they appeared. In § 629 (16), to which particular attention was devoted, the addition was "or of any right secured by any law providing for equal rights." In § 563 (12) it was less precise: "or of any right secured by any law." In § 1979 the relevant language became "secured by the Constitution and laws." Despite the variations between these phrases, I am fully persuaded that each was intended to express the same meaning that is explicitly attributed by the revisers to the text of § 629 (16).[19] One might wish that the revisers had expressed themselves with greater precision, but when viewed in the context of the purpose and history of this legislation, it becomes evident that the insertion by the revisers of "and laws" in § 1979 was intended to do no more than ensure that federal legislation providing specifically for equality of rights would be brought within the ambit of the civil action authorized by that statute.[20]

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[19] Although many of the commentators who have grappled with the problem of reconciling or explaining the differences in the language of §§ 563 (12), 629 (16), and 1979 argue, largely on the basis of their view of judicial policy, that the plain language of § 629 (16) should be ignored in favor of the apparently broader sweep of § 1979, they do not seriously contend that the two may differ in scope. *E. g.*, Note, The Propriety of Granting a Federal Hearing for Statutorily Based Actions Under the Reconstruction-Era Civil Rights Acts: *Blue* v. *Craig*, 43 Geo. Wash. L. Rev. 1343, 1371–1373 (1975); Note, 72 Colum. L. Rev., *supra* n. 15, at 1425–1426; Herzer, Federal Jurisdiction Over Statutorily-Based Welfare Claims, 6 Harv. Civ. Rights-Civ. Lib. L. Rev. 1, 7–9 (1970); Cover, Establishing Federal Jurisdiction in Actions Brought to Vindicate Statutory (Federal) Rights When No Violations of Constitutional Rights Are Alleged, 2 Clearinghouse Rev., No. 16, pp. 5, 24–25 (Feb.–Mar. 1969). But see Note, The Proper Scope of the Civil Rights Acts, 66 Harv. L. Rev. 1285, 1292–1293 (1953). Thus, under the rationale adopted by most of the commentators that support his position, MR. JUSTICE WHITE's concession that § 1343 (3) must be read narrowly is irreconcilable with his assertion regarding the scope of § 1983.

[20] Once it is understood that "and laws" in § 1979 is equivalent in meaning to "any law providing for equal rights" in § 629 (16), it remains

Indeed, any other conclusion is unsupportable. It would be remarkable if the same revisers who disavowed any intent to make substantive changes in federal law and drafted § 629 (16) as the jurisdictional partner to § 1979 would, without any comment whatsoever,[21] add language to § 1979 for the purpose of making its coverage markedly incongruent with that of § 629 (16), at the same time expanding its scope far beyond that originally provided by Congress. Indeed, as an illustration of what they were confident Congress had *not* intended with the jurisdictional counterpart to § 1979, the revisers raised the specter of opening the federal courts to actions completely unrelated to the deprivation of civil rights. See n. 11, *supra*. Yet MR. JUSTICE WHITE would hold that just such a result was accomplished when the words "and laws" quietly appeared in § 1979.

The underlying historical question, of course, is not simply what the revisers intended, but what Congress meant by the language of § 1979 as it finally was enacted. In light of Congress' clearly expressed purpose not to alter the meaning of prior law, see Part I, *supra*, it cannot be argued, absent some indication to the contrary, that Congress intended "and laws" to mean anything other than what was understood by the revisers, as shown above.

Nor was Congress merely silent on this issue. The bill to enact the revision into positive law received considerable attention in the House, where two special night sessions were convened each week for as long as necessary to allow all Members wishing to scrutinize the bill to do so until the

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to determine precisely what is meant by an "equal rights" law. That problem is not presented by these cases. There is no need here to go beyond the Court's decision that the Social Security Act is not such a law.

[21] The absence of any comment by the revisers on § 1979 is especially significant in light of the fact that their general practice apparently was to add an explanatory note to the 1872 Draft whenever they believed their proposed language might be construed as effecting a change in existing law. See 2 Cong. Rec. 648 (1874) (remarks of Rep. Hoar).

entire document had been reviewed.[22] See 2 Cong. Rec. 646–650 (1874). During these meetings, many amendments were adopted, see, *e. g., id.*, at 819–829, 849–858, 995–1001, 2709–2714, each on the understanding that it was restorative of the original meaning of the Statutes at Large, and not an amendment to existing law. See *id.*, at 647–648 (remarks of Rep. Poland). During one of these sessions, Representative Lawrence observed that the work of revision necessarily required changes in the language of the original statutes. He illustrated the method used by the revisers by inviting his colleagues to compare the original text of the very civil rights statutes at issue here with the corresponding text of the revision. Included in the statutes read verbatim were § 1 of the 1871 Act, which, of course, does not contain the reference to "laws," and the text of § 1979, which does. In the course of his remarks Representative Lawrence said: "A comparison of . . . these will present a fair specimen of the manner in which the work has been done, and from these all can judge of the accuracy of the translation." 2 Cong. Rec., at 827–828. The House was convened for the sole purpose of detecting language in the revision that changed the meaning of existing law. From the absence of any comment at this point in the session, one may infer that no one present thought that § 1979 would effect such a change.[23]

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[22] The Senate did not give the bill the degree of attention it enjoyed in the House. After the latter had passed the bill, the Senate adopted it without amendment after only a very brief discussion. See 2 Cong. Rec. 4284–4286 (1874).

[23] The implication in MR. JUSTICE WHITE's opinion that his position is supported by Representative Lawrence's comments on this occasion is simply contradicted by the record. See *post*, at 664–665, and n. 40. Given the setting in which the comments were made, Congress' awareness that the language of § 1979 had been altered indicates its understanding that no change in substance had been effected. Representative Lawrence's statement that the final text of Rev. Stat. § 5510, as opposed to the Draft version of that statute, was broad enough "to include all [the rights] covered" by § 1 of the 1871 Act, 2 Cong. Rec. 828 (1874), does no more

In spite of the unchallenged body of evidence to the contrary, MR. JUSTICE WHITE insists that § 1983 "was . . . expanded to encompass all statutory as well as constitutional rights." *Post*, at 654. I find this conclusion to be completely at odds with the legislative history of the statute and its jurisdictional counterparts.[24]

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than confirm the view that §§ 5510 and 1979 were intended to be coextensive in scope. See *infra*, at 641–644. Nor does the observation that § 5510 might "operate differently . . . in a very few cases" from its antecedent provisions lend support to MR. JUSTICE WHITE's view. See n. 28, *infra*.

[24] Without offering his own interpretation of the legislative history, MR. JUSTICE WHITE now views that history as replete with "ambiguities, contradictions, and uncertainties." *Post*, at 669. These confusions, however, are for the most part not inherent in the legislative history. With all deference, it seems to me they are largely the product of his opinion concurring in the judgment.

For example, nothing in the legislative history of § 1983 or § 1343 (3), or in my analysis, implies that the 1866 Act "provided the outer limits of the federal civil rights effort in the post-Civil War years." *Post*, at 663. Indeed, provisions of both the 1870 and 1871 Acts go well beyond the 1866 law. Nor are the four "technical problems," see *post*, at 667–668, suggested by MR. JUSTICE WHITE apposite: (i) The revisers' statement that the rights secured by § 16 of the 1870 Act were to be protected against adverse state action by § 1979 does not require the conclusion that § 16 was the exclusive source of such rights. See n. 13, *supra*. (ii) Nor does it follow from the revisers' prediction that the courts would not construe rights "secured by the Constitution" to include rights "secured by a law authorized by the Constitution" that they thought that *every* federal statute would be encompassed by the phrase "any law providing for equal rights." To the contrary, they recognized that the unique relationship between the Constitution and the recently enacted civil rights statutes made it quite proper to refer to the latter as constitutional rights. See *supra*, at 632–633, and n. 14. (iii) The language in §§ 563 (12) and 1979 could indeed have been chosen more carefully. See *supra*, at 637. But the variations between these statutes are explained by the manner in which the revision was undertaken, see n. 15, *supra*, and do not preclude discovery of their precise meaning. (iv) If the revisers erred in limiting the jurisdictional provisions in the revision derived from § 3 of the 1866 Act to actions brought under color of state law, that error is quite independent

III

The legislative history of §§ 1979, 629 (16), and 563 (12) notwithstanding, the opinion concurring in the judgment argues that the words "and laws" in § 1983 should be read broadly because the Court has given such a construction to similar language appearing in 18 U. S. C. §§ 241 and 242. This assertion is undermined, however, by the history of the statutes in question.

Section 242 originated in § 2 of the 1866 Act. As noted *supra*, at 627, § 2 made it a misdemeanor to deprive, under color of state law, any citizen of the rights specified in § 1 of that Act. Section 2 was repeated, with some modification, as § 17 of the 1870 Act. Section 17 made criminal the deprivation, under color of state law, of the rights enumerated in § 16.[25]

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of and does not detract from their statement explaining the reference in § 629 (16) to equal rights laws. As I have shown, this reflects the correct interpretation of "and laws" in § 1983.

To be sure, no reading of history, including my understanding of the legislative history of § 1983, is beyond criticism. But any difficulties identified by MR. JUSTICE WHITE are inconsequential when compared with his disregard for Congress' unequivocal wish not to alter the content of federal statutory law. See Part I, *supra*. The arguments advanced in this opinion take full account of that legislative intent, while MR. JUSTICE WHITE's opinion largely assumes the very fact to be proved: that § 1983 "was . . . expanded [in the revision] to encompass all statutory . . . rights." *Post*, at 654. The direct evidence of Congress' intent with respect to the alterations made in the language of § 1983 flies directly in the face of this assumption. See *supra*, at 638–639, and n. 23.

While none of us is invariably consistent, MR. JUSTICE WHITE has not always disparaged the history of the post-Civil War civil rights legislation. In prior cases he has insisted that the 19th-century Civil Rights Acts should be read narrowly when such a construction is required by their legislative history. See *Runyon* v. *McCrary*, 427 U. S. 160, 192 (1976) (WHITE, J., dissenting); *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409, 449 (1968) (Harlan, J., joined by WHITE, J., dissenting).

[25] The rights enumerated in § 16, of course, were taken directly from § 1 of the 1866 Act. See *supra*, at 628.

An entirely independent criminal provision of the 1870 Act, § 6, made a far broader sweep. It did not require that the conduct it proscribed be performed under color of state law, and it explicitly prohibited certain conduct intended to deprive a citizen of "any right or privilege granted or secured . . . by the Constitution *or laws of the United States.*" (Emphasis added.) [26] Significantly, this is the only statute discussed in this or MR. JUSTICE WHITE's separate opinion in which the reference to statutory law as well as the phrase "rights secured by the Constitution" appears in the text originally drafted by Congress; in all other cases the reference to "laws" originated in the revision. Section 6 is thus the only one of these statutes for which there is a substantial argument that Congress truly intended to cover *all* federal statutory law.

Sections 6 and 17 of the 1870 Act were included in the revision as §§ 5508 and 5510, respectively, and MR. JUSTICE WHITE relies on the fact that both emerged with language that, on its face, covered all rights secured by federal statutory law. While he may well be correct that the words "Constitution or laws" in § 5508 should be taken at face value, the evidence does not support the same conclusion with respect to § 5510.

In the 1872 Draft of the revision, § 5510 was written to provide for criminal sanctions against deprivations, under color of state law, "of any right secured or protected by section —— of the Title CIVIL RIGHTS." 2 Draft 2627. Although no explanatory note accompanies this section, it is evident from the face of the text that the revisers were attempting to preserve the limited scope of § 17 of the 1870 Act by restricting its coverage to specifically enumerated rights. In the final version of the revision, the language had been changed, appar-

[26] The conduct proscribed included conspiracy, going "in disguise upon the public highway," and going "upon the premises of another."

ently by Mr. Durant,[27] see *supra*, at 625, to punish deprivations of rights "secured . . . by the Constitution and laws."

In light of the historical explanation of the meaning of "Constitution and laws" in § 1979, it is not surprising that this term should have been substituted for the language used in the draft of § 5510. As we have seen, in other contexts the appendage of "and laws" to "rights . . . secured by the Constitution" simply referred to the rights protected by the legislation enacted to provide for equal rights, as authorized by the recently adopted Amendments to the Constitution. Indeed, the House debates make explicit the fact that the change from the revisers' draft of § 5510 to the text ultimately adopted was made simply to be certain that this criminal provision would encompass the rights covered by the existing civil rights statutes discussed at length in this opinion: § 1 of the 1866 Act, § 16 of the 1870 Act, and § 1 of the 1871 Act. See 2 Cong. Rec. 827–828 (1874) (remarks of Rep. Lawrence). There is no evidence that Congress intended § 5510 to cover all federal statutory law.[28]

Despite the apparent similarity of the language of 18 U. S. C. §§ 241 and 242, therefore, they are in fact very different in scope. There is solid historical justification for the view that § 241 "dealt with Federal rights and with all Federal rights, and protected them in the lump," *United States* v. *Mosley*, 238 U. S. 383, 387 (1915) (interpreting Rev. Stat. § 5508, currently 18 U. S. C. § 241), because the expansive

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[27] In commenting on § 5510 during one of the special evening sessions of the House, see *supra*, at 638–639, Representative Lawrence attributed the final version of this statute to Mr. Durant. 2 Cong. Rec. 828 (1874).

[28] Although Representative Lawrence hypothesized that § 5510 "may operate differently from the original three sections in a very few cases," 2 Cong. Rec. 828 (1874), this is far from a suggestion that this provision was to have the breadth attributed to it by MR. JUSTICE WHITE. Indeed, a perusal of the House debates on the revision makes clear that any such intent would have been thoroughly inconsistent with the very purpose for which the House was then in session. See *supra*, at 639.

language was put there by Congress itself. The same simply is not true of § 242. Considered in its historical context, the addition of "and laws" to this statute requires a much more modest reading. Even if there are dicta in our opinions to the effect that §§ 241 and 242 cover an identical class of deprivations of rights, such a construction of § 242 was not made with the benefit of the close historical scrutiny necessary to a proper understanding of this law.[29] I agree with MR. JUSTICE WHITE that "and laws" means the same thing in § 1983 as in § 242.[30] I am convinced, however, that he misconstrues the phrase in both instances.

IV

MR. JUSTICE WHITE states that he is "not disposed to repudiate" the dicta in some of our prior decisions. See *post*, at 658. It is, of course, true that several decisions contain statements premised upon the assumption that § 1983 covers a broad range of federal statutory claims. *E. g., Edelman* v. *Jordan*, 415 U. S. 651, 675 (1974); *Greenwood* v. *Peacock*, 384 U. S. 808, 829–830 (1966). But that assumption has been made uncritically. Until these cases, no prior opinion of the Court or of a Justice thereof has undertaken a close examination of the pertinent legislative history of § 1983, including the work of the commissioners who drafted the Revised Statutes of 1874. Thus, there is nothing in the cases cited by

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[29] MR. JUSTICE WHITE's assertion that § 241 encompasses the same rights as § 242, is based in part upon dicta in opinions that have merely assumed this fact without reasoned consideration of the legislative history. See *United States* v. *Price*, 383 U. S. 787, 797 (1966); *Screws* v. *United States*, 325 U. S. 91, 119 (1945) (Rutledge, J., concurring in result). The proper scope of § 242 is not an issue in this case, except as circumstantial evidence of the meaning of § 1983. In light of the discussion above, there clearly are substantial reasons to doubt the correctness of the dicta concerning § 242 upon which MR. JUSTICE WHITE relies.

[30] The relevant text in 18 U. S. C. § 242 now reads: "secured . . . by the Constitution *or* laws." (Emphasis added.)

MR. JUSTICE WHITE that precludes a fresh look at this question.

In *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978), decided just last Term, the Court was willing to go beyond confessing error in previous dicta. Indeed, the Court squarely overruled the holding in *Monroe* v. *Pape*, 365 U. S. 167 (1961), that municipalities are not "persons" for purposes of § 1983, despite almost two decades of lower courts' reliance upon *Monroe*, and notwithstanding our exceptional reluctance to overrule our prior constructions of federal statutes. In a case such as this, where no square holdings have perpetuated our misapprehension of the meaning of § 1983, we should be the more willing to correct historical error.

In addition to the historical evidence of the intent of Congress and the revisers in enacting § 1983, there are weighty policy and pragmatic arguments in favor of the construction advanced by this opinion. It is by no means unusual for Congress to implement federal social programs in close cooperation with the States. The Social Security Act, which these cases allege was violated, is a good example of this pattern of cooperative federalism. If § 1983 provides a private cause of action for the infringement, under color of state law, of *any* federal right, then virtually every such program, together with the state officials who administer it, becomes subject to judicial oversight at the behest of a single citizen, even if such a dramatic expansion of federal-court jurisdiction never would have been countenanced when these programs were adopted. To be sure, Congress could amend or repeal § 1983, or, as MR. JUSTICE WHITE concedes, *post*, at 672, limit its application in particular cases. As we said in *Monell* v. *New York City Dept. of Social Services*, *supra*, at 695, however, we should not " 'place on the shoulders of Congress the burden of the Court's own error' " (quoting *Girouard* v. *United States*, 328 U. S. 61, 70 (1946)). That problem is avoided if § 1983 is read, as it

should be, as encompassing only rights secured by the Constitution and laws providing for equal rights.

MR. JUSTICE WHITE, concurring in the judgment.

In order for there to be federal district court jurisdiction under 28 U. S. C. § 1343 (3), two requirements must be met. First, the suit must be "authorized by law," and, second, the suit must seek redress of a deprivation under color of state law of any right "secured by the Constitution of the United States or by any Act of Congress providing for equal rights . . . ." [1] Title 42 U. S. C. § 1983 provides a cause of action for deprivations under color of state law of any right "secured by the Constitution and laws" of the United States.[2] I agree with the Court's conclusion that, even assuming the claims in these cases—of inconsistency between state welfare practices and the Social Security Act—are "authorized by law" because they are within the reach of § 1983, the district courts do not have jurisdiction under § 1343 (3) because the claims do not involve deprivation of constitutional rights and the Social Security Act is not a law providing for equal rights.[3]

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[1] Title 28 U. S. C. § 1343 (3) provides:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

. . . . . .

"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

[2] Title 42 U. S. C. § 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[3] My three dissenting Brethren conclude that § 1983 is the "equal rights" law referred to in § 1343 (3). But this construction makes superfluous

Yet I am not able to reach this conclusion without addressing the issue the Court does not resolve: whether §§ 1983 and 1343 (3) are coextensive. Both provisions were derived from § 1 of the Civil Rights Act of 1871, 17 Stat. 13,[4] which did not contain a jurisdictional provision separate from the cause of action. Rather, the 1871 Act stated that "such proceeding" as therein authorized would "be prosecuted in the several district or circuit courts of the United States . . . ."[5] However, for over a century—since the general statutory revision in 1874—the plain terms of the cause of action and the jurisdictional provision at issue here, § 1343 (3), have not been commensurate. In order to determine with confidence

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§ 1343 (3)'s reference to constitutional claims, and renders unnecessary the nearly precise repetition in § 1343 (3) of the recital in § 1983 specifying suits brought against action "under color of any statute, ordinance, regulation, custom or usage." Further, the legislative evolution of § 1343 (3) cannot support the construction urged by the dissent. See n. 44, *infra*.

[4] This provision read:

"[A]ny person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled 'An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication'; and the other remedial laws of the United States which are in their nature applicable in such cases." 17 Stat. 13.

[5] The first section of the 1871 Act provided that the rules governing "rights of appeal" and other procedural matters would be those provided in § 3 of the Civil Rights Act of 1866, 14 Stat. 27. See n. 4, *supra*. Section 3 of the 1866 Act required, *inter alia*, that jurisdiction "shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect."

the scope of rights encompassed by either provision, it is necessary, I believe, to examine the evolution of and to construe both provisions.

Certainly the issue of the reach of the § 1983 cause of action has been properly preserved for review in this Court.[6] Throughout the history of this litigation, the aid recipients have urged that §§ 1983 and 1343 (3) are necessarily congruent, and that their claims are encompassed by both provisions.[7] My three dissenting Brethren are of this view. On the other hand, the State of New Jersey and my Brother

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[6] Nor can the significance of this controversy be gainsaid. If § 1983 does not encompass the claims in these cases, then not only is § 1343 jurisdiction defeated, but, unless some other authority for bringing suit were ascertained, general federal-question jurisdiction under 28 U. S. C. § 1331 also would not be available—even were the requisite amount in controversy—because a claim under § 1983 would not be stated. Persons alleging inconsistency between state welfare practices and federal statutory requirements, or asserting state infringement of any federal statutory entitlement unrelated to equal or civil rights, would be precluded from having such claims heard in federal court unless authorized to do so by the statute granting the entitlement.

In 1978, the House of Representatives passed legislation that would remove the amount-in-controversy requirement in all federal-question suits under § 1331. H. R. 9622, 95th Cong., 1st Sess. (1978).

[7] Plaintiff recipients in both cases alleged a cause of action under § 1983, and in each case the District Court refused the state officials' motion to dismiss for failure to state a claim upon which relief could be granted. Both District Courts further held that there was jurisdiction over the § 1983 cause of action under 28 U. S. C. § 1343. *Houston Welfare Rights Organization* v. *Vowell*, 391 F. Supp. 223 (SD Tex. 1975); 418 F. Supp. 566 (NJ 1976). On appeal, the Fifth Circuit, in No. 77–719, affirmed both these findings below, as well as the holding for recipients on the merits of the claim under the Social Security Act. *Houston Welfare Rights Organization* v. *Vowell*, 555 F. 2d 1219 (1977). In No. 77–5324, the Third Circuit assumed for purposes of addressing the § 1343 issue that a cause of action was stated under § 1983, and went on to direct dismissal for want of jurisdiction. 560 F. 2d 160 (1977). Respondents in No. 77–5324 continue to press the position that recipients have not stated a § 1983 cause of action.

POWELL appear to be of the view that while the two provisions are necessarily of equal scope, neither reaches the claims in these cases. The Court, by not resolving the scope of § 1983, apparently rejects the view that the two sections are necessarily coextensive.[8] However, it leaves open the possibility embraced by the State of New Jersey and my Brother POWELL that the claims in these cases are encompassed by neither § 1983 nor § 1343 (3).

I would and do reject this possibility. The provisions are not of equal scope: Although the suits in these cases are authorized by § 1983, they are not within the jurisdiction of the federal courts under § 1343 (3). The legislative history supports this view when approached with readiness to believe that Congress meant what the plain words it used say, as we have been taught is the proper approach to civil rights legislation originating in the post-Civil War days. See *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409, 436–437 (1968); *United States* v. *Price*, 383 U. S. 787 (1966); *United States* v. *Guest*, 383 U. S. 745 (1966). The conclusion that § 1983 provides a remedy for deprivations under color of state law for federal statutory as well as constitutional rights not only reflects a straightforward and natural reading of its language, but also is supported by our cases that have assumed or indicated in dicta that this is the correct construction of the provision, as well as by our decisions giving the same construction to the post-Civil War statutes criminalizing invasions of federal rights in language almost identical to that found in § 1983. On the other hand, the conclusion that § 1343 (3) encompasses only rights granted under "equal rights" statutes, in addition to constitutional rights, is compelled because of the equally plain terms of that statute and the absence of any overriding indication in the

[8] See *ante*, at 616 (§ 1983 and § 1343 (3) "coverage is, or at least originally was, coextensive"). Previous cases have occasionally referred to § 1343 (3) as the jurisdictional counterpart of § 1983, see *Examining Board* v. *Flores de Otero*, 426 U. S. 572, 583 (1976); *Lynch* v. *Household Finance Corp.*, 405 U. S. 538, 540 (1972).

legislative history that these plain terms should be ignored. The argument of my Brother POWELL that § 1983 was intended to remedy only those rights within the "equal rights" ambit of § 1343 (3) is not at all convincing with respect to the meaning to be attached to its predecessor, § 1979 of the Revised Statutes of 1874, at the time it was adopted, much less with respect to the construction to be accorded it in the light of developments during the last century.

I

The first post-Civil War legislation relevant to ascertaining the meaning of §§ 1983 and 1343 (3) is the Civil Rights Act of 1866, 14 Stat. 27. Section 1 of that Act secured to all persons, with respect to specified rights, such as the right to contract, "the same right . . . as is enjoyed by white citizens." Under § 2 of the 1866 Act, deprivation of these rights under color of state law was a misdemeanor.[9] Section 3 of the Act provided concurrent district and circuit court jurisdiction "of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them" by § 1. Section 3 also provided for removal of certain criminal and civil cases from federal court. Unlike § 2, neither § 1 nor § 3 was limited to deprivations arising

[9] Section 2 of the Civil Rights Act of 1866 provided:
"[A]ny person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is proscribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court." 14 Stat. 27.

under color of state law.[10] *Jones* v. *Alfred H. Mayer Co., supra,* at 420–437.

Because of uncertainty as to its authority under the Thirteenth Amendment to enact the foregoing provisions, Congress in §§ 16 and 17 of the Enforcement Act of 1870, 16 Stat. 144, substantially re-enacted §§ 1 and 2 of the 1866 Act pursuant to § 5 of the Fourteenth Amendment, which had been ratified in the interim. Although § 8 of the 1870 Act provided for concurrent district and circuit court jurisdiction "of all causes, civil and criminal, arising under this act, except as herein otherwise provided," § 18 re-enacted the 1866 Act by reference and provided that §§ 16 and 17 would be enforced according to the provisions of the 1866 Act. Further, § 6 of the 1870 Act made it a crime to conspire to deny any person "any right or privilege granted or secured . . . by the Constitution or laws of the United States." In contrast to § 17 (re-enacting § 2 of the 1866 Act), which criminalized only color-of-law deprivations of the specified rights of equality guaranteed by § 16, § 6 reached "*all* of the rights and privileges" secured by "*all* of the Constitution and *all* of the laws of the United States." *United States* v. *Price, supra,* at 800 (emphasis in original).[11]

Section 1 of the Civil Rights Act of 1871, following the lead of the 1866 and 1870 Acts in opening the federal courts to remedy deprivations of federal rights, created a new civil remedy neither repetitive of nor entirely analogous to any of the provisions in the earlier Civil Rights Acts. Section 1 of the 1871 Act, like § 17 of the 1870 Act, provided redress only for deprivations of rights under color of state law. But whereas § 17 applied only where there was deprivation of the rights of equality secured or protected by § 16 (re-enacting § 1

[10] See *In re Turner,* 24 F. Cas. 337 (No. 14,247) (CC Md. 1867); *United States* v. *Rhodes,* 27 F. Cas. 785 (No. 16,151) (CC Ky. 1866).

[11] See, *e. g., United States* v. *Hall,* 26 F. Cas. 79 (No. 15,282) (CC SD Ala. 1871) (right of peaceable assembly and free speech within § 6 of Civil Rights Act of 1870). See generally *United States* v. *Guest,* 383 U. S. 745 (1966); *United States* v. *Mosley,* 238 U. S. 383, 387–388 (1915).

of the 1866 Act), the new civil remedy in the 1871 Act encompassed deprivations of "any rights, privileges, or immunities secured by the Constitution of the United States." [12] In this respect it was similar to the criminal provision provided in § 6 of the 1870 Act, which, however, encompassed invasions of any federal statutory, as well as constitutional, right. Moreover, although the new civil remedy did not reach deprivations under color-of-law of statutory rights, neither did it modify or replace remedies under the 1866 and 1870 Acts for deprivations of rights of equality specified therein, which remedies were applicable to private deprivations as well as deprivations under color of state law,[13] see Gressman, The Unhappy History of Civil Rights Legislation, 50 Mich. L. Rev. 1323, 1326–1328 (1952).

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[12] During the debate on the Civil Rights Act of 1871, Representative Shellabarger explained that the "model" for the provision was § 2 of the 1866 Act, which "provides a criminal proceeding in identically the same case as this one provides a civil remedy," Cong. Globe, 42d Cong., 1st Sess., App. 68 (1871). However, Representative Shellabarger also stressed the broadened scope of § 1 of the 1871 Act:

"[Section 1] not only provides a civil remedy for persons whose former condition may have been that of slaves, but also to all people where, under color of State law, they or any of them may be deprived of rights to which they are entitled under the Constitution by reason and virtue of their national citizenship." *Ibid.*

See also *id.*, at App. 216–217 (Sen. Thurman):

"This section relates wholly to civil suits. . . . Its whole effect is to give to the Federal Judiciary that which does not now belong to it . . . . It authorizes any person who is deprived of any right, privilege, or immunity secured to him by the Constitution of the United States, to bring an action against the wrong-doer in the Federal courts, and that without any limit whatsoever as to the amount in controversy."

[13] The remaining portions of the 1871 Act were directed to suppressing the terror of the Ku Klux Klan. Section 2, which did not have a color-of-law requirement, defined the crimes, *inter alia*, of conspiracy to prevent federal officials from enforcing the laws of the United States, and of conspiracy to deprive "any person or any class of persons of the equal protection of the laws." Jurisdiction was to be in federal district or circuit courts. In addition, § 2 provided that persons injured in violation of

As relevant for present purposes, this was the status of civil rights legislation when the Revised Statutes of 1874 were adopted. With respect to the matters at issue here, the 1874 revision of the federal statutory law did not appreciably alter the substantive rights guaranteed or secured by the federal law. Federal constitutional rights, of course, could not have been amended by the revision. Furthermore, insofar as material to these cases, there were no substantive statutory rights newly created, modified, or eliminated.[14] Thus, § 16 of the 1870 Act, in essence a restatement of § 1 of the 1866 Act, survived but was split into two sections of the Revised Statutes, §§ 1977 and 1979.[15] These two sections remained a declaration of rights that all citizens in the country were to have against each other, as well as against their Government. *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409 (1968).

With respect to the remedial power of the federal courts, however, the 1874 revision effected substantial changes[16] that are relevant to the present discussion.

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such conspiracies "or deprived of having and exercising any right or privilege of a citizen of the United States . . . may have and maintain an action for the recovery of damages . . . , such action to be prosecuted in the proper district or circuit court of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts under the provisions of" § 3 of the 1866 Act.

[14] The recodification was not generally undertaken for the purpose of altering the substantive provisions of federal law. See Revision of Statutes Act of 1874, § 2, 18 Stat. 113; Revision of Statutes Act of 1866, § 1, 14 Stat. 74.

[15] The former guaranteed to all persons "the same right" to contract, to sue, etc., "as is enjoyed by white citizens," and to be subject to like penalties and taxes. This provision, with minor word changes, is now 42 U. S. C. § 1981. Revised Statutes § 1978 guaranteed to all citizens "the same right . . . as is enjoyed by white citizens" to inherit, hold, and convey real and personal property. This section was the precursor of 42 U. S. C. § 1982.

[16] See 1 C. Bates, Federal Procedure at Law 473 (1908) ("The original judiciary act, and many other federal statutes, were badly mutilated in the revision . . .").

First, in the area of crimes, while § 6 of the 1870 Act (criminalizing private as well as color-of-law conspiracies to deprive persons of their federal constitutional or statutory rights) was retained essentially unchanged as § 5508 of the Revised Statutes, § 17 of the 1870 Act (the criminal provision originally enacted as § 2 of the 1866 Act and directed solely at deprivations under color of state law) was expanded to parallel § 5508. Section 17 had criminalized only the infringement of the specific rights of equality guaranteed by § 16 of the 1870 Act, but the new provision, § 5510 of the Revised Statutes, was "broadened to include as wide a range of rights as [§ 5508] already did: 'any rights, privileges, or immunities, secured or protected by the Constitution and laws of the United States.'" *United States* v. *Price*, 383 U. S., at 803.

Second, the civil remedy directed solely at deprivations under color of law was likewise expanded to encompass all statutory as well as constitutional rights. Thus, whereas § 1 of the 1871 Act had provided for redress of color-of-law deprivations of rights "secured by the Constitution of the United States," § 1979 of the Revised Statutes provided a civil remedy for such deprivation of rights secured by the "Constitution and laws," the substantive federal rights protected thus mirroring those covered by §§ 5508 and 5510.[17] As noted with respect to the widened scope of § 5510: "The substantial change thus effected was made with the customary stout assertions of the codifiers that they had merely clarified and reorganized without changing substance." *United States* v. *Price*, *supra*, at 803 (footnote omitted).

Third, the jurisdictional provisions of the various Civil Rights Acts were split off and consolidated in the Revised Statutes. Section 3 of the 1866 Act (re-enacted under § 18 of the 1870 Act), which provided federal jurisdiction for "all causes . . . affecting persons . . . denied" the rights now

[17] Revised Statutes § 1979 read precisely as does 42 U. S. C. § 1983, see n. 2, *supra*.

stated in §§ 1977 and 1978, was entirely deleted. The jurisdictional provision of the 1871 Act, authorizing federal courts to entertain civil suits brought pursuant thereto, became the basis for the new jurisdictional provisions in the Revised Statutes, which were stated separately for the district and circuit courts. Thus, Rev. Stat. § 563 (12) invested the district courts with jurisdiction over all civil actions—without regard to the amount in controversy—for any deprivation under color of state law of any rights "secured by the Constitution of the United States, or . . . by any law of the United States . . . ." [18] This jurisdictional grant tracked the expanded remedy provided in § 1979.

With respect to the circuit courts, however, Rev. Stat. § 629 (16) provided jurisdiction over deprivation under color of state law of federal constitutional rights—without regard to the amount in controversy—but stopped short of encompassing suits involving violations of statutory rights, referring only to any right "secured by the Constitution of the United States, or . . . by any law providing for equal rights . . . ." [19] Nonetheless, the circuit courts as well as the district courts were separately provided with criminal jurisdiction over cases arising under §§ 5508 and 5510, both of which reached deprivation of rights secured not only by the Constitution but by any law of the Union.[20]

Thus, under the Revised Statutes of 1874 the federal circuit

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[18] Section 563 (12) of the Revised Statutes provided jurisdiction for actions alleging deprivation under color of state law of "any right, privilege, or immunity secured by the Constitution of the United States, or of any right secured by any law of the United States to persons within the jurisdiction thereof."

[19] Section 629 (16) of the Revised Statutes provided jurisdiction for suits to redress the deprivation under color of state law of "any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States."

[20] See Revised Statutes of 1874, §§ 563 (1), 629 (20).

courts were not empowered to entertain certain categories of suits brought to vindicate federal statutory rights against state invasion. Of course, at this time neither the district nor circuit courts had been granted general federal-question jurisdiction; rather, they existed to deal with diversity cases and suits in specialized areas of federal law such as federal criminal prosecutions, civil suits by the United States, and civil rights cases. In 1875, however, Congress extended to the circuit courts original jurisdiction, concurrent with the courts of the several States, "of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution or laws of the United States, or treaties made . . . ." Act of Mar. 3, 1875, 18 Stat. 470.[21] Thereafter, on the face of the statutes, the circuit courts had original jurisdiction, if the jurisdictional amount was satisfied, over any suit arising under the Constitution or any law of the United States, as well as jurisdiction, without regard to the amount in controversy, of any case involving a color-of-state-law deprivation of any constitutional right or any right secured by law pro-

[21] There is remarkably little contemporaneous legislative comment concerning the grant of federal-question jurisdiction in 1875. As originally passed by the House of Representatives, the legislation conformed to its title, "An act regulating the removal of causes from State courts to the circuit courts of the United States," and dealt only with cases involving diversity of citizenship. 2 Cong. Rec. 4301–4304 (1874). However, as it emerged from the Senate Judiciary Committee, the bill provided both for removal and for original jurisdiction of the circuit courts of federal-question cases. See *id.*, at 4979. After heated debate concerning primarily the broad venue provisions in the legislation, the Senate enacted the bill, and directed that its title be amended to read:

"An act to determine the jurisdiction of the circuit courts of the United States and to regulate the removal of causes from State courts, and for other purposes." *Id.*, at 4979–4988.

In conference, the House agreed to the Senate's changes in the original legislation. See also F. Frankfurter & J. Landis, The Business of the Supreme Court 65–68, and n. 34 (1928).

viding for equal rights.[22] The district courts had no general "arising under" jurisdiction but retained their original jurisdiction over suits alleging deprivation under color of state law of any right secured either by the Constitution or by any law of the United States, without regard to the amount in controversy.

With the adoption of the 1911 Judicial Code, the circuit courts were abolished, and the district courts became the sole federal courts of first instance. The principal elements of the district court's jurisdiction included diversity cases involving in excess of $3,000,[23] all cases arising under the Constitution or laws of the United States involving in excess of $3,000,[24] all criminal offenses under the federal laws—including those arising under Rev. Stat. §§ 5508 and 5510[25]—and a series of specialized types of federal-law cases having no amount-in-controversy requirement.[26] Included in this latter category was § 24 (14), which provided jurisdiction for all suits at law or in equity to redress deprivation under color of state law "of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States." With minor changes in wording, this provision is now codified at 28 U. S. C. § 1343 (3).

The language of Rev. Stat. § 1979 (now codified at 42 U. S. C. § 1983) remained unchanged, providing a federal

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[22] The grant of general federal-question jurisdiction, with its $500 amount-in-controversy requirement, did not diminish the grants of jurisdiction not subject to this requirement. *Lynch* v. *Household Finance Corp.*, 405 U. S., at 547–549.

[23] § 24 (1), Judiciary Act of 1911, 36 Stat. 1091.

[24] *Ibid.*

[25] § 24 (2).

[26] See, *e. g.*, § 24 (3) (admiralty jurisdiction); § 24 (16) (jurisdiction over certain suits involving national banks); § 24 (22) (jurisdiction over suits involving, *inter alia*, labor laws).

cause of action for color-of-law deprivations of any right "secured by the Constitution and laws." On the face of the jurisdictional statutes, then, it would appear that after 1911 § 1983 cases could be brought in federal court under general federal-question jurisdiction if they involved the necessary amount in controversy; otherwise, they could be entertained in federal court only if they sought redress for deprivation of a constitutional right or of a right under a federal statute providing for equal rights.

II

Having examined the context in which the foregoing statutory developments occurred, I agree with the Court that there is nothing in the relevant provisions or in their history that should lead us to conclude that Congress did not mean what it said in defining the jurisdiction of the circuit and district courts in 1874 or, much less, that in adopting the Judicial Code in 1911, Congress meant the language "any law of the United States providing for equal rights" to mean "any law of the United States."

By the same token, I also conclude that nothing in the history and evolution of § 1983 leads to the conclusion that Congress did not mean what it said in 1874 in describing the rights protected as including those secured by federal "laws" as well as by the "Constitution." I am, therefore, not disposed to repudiate the view repeatedly stated in previous cases that § 1983 encompasses federal statutory as well as constitutional entitlements. Although the Court has not previously given extended consideration to the scope of the rights protected by § 1983,[27] our acceptance of the plain terms of that statute and

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[27] Until *Hague* v. *CIO*, 307 U. S. 496 (1939), there were few cases in this Court explicitly dealing with the scope of 42 U. S. C. § 1983, and those decisions did not raise the issue of the meaning of the "and laws" term in the statute. Some of the early cases were dismissed for failure to allege a deprivation under "color of law." See, *e. g.*, *Huntington* v. *City*

analogous criminal proscriptions has been consistent, and for over a century Congress has not acted to rectify any purported error in our construction of these provisions.

Until today, we have expressly declined, most recently in *Hagans* v. *Lavine*, 415 U. S. 528, 533–535, n. 5 (1974),[28] to indicate whether Social Security Act claims based solely on alleged inconsistency between state and federal law might be

of New York, 193 U. S. 441 (1904); *Barney* v. *City of New York*, 193 U. S. 430 (1904). The concept of state action relied upon in these opinions was rejected in *Home Tel. & Tel. Co.* v. *Los Angeles*, 227 U. S. 278 (1913). See also *Devine* v. *Los Angeles*, 202 U. S. 313 (1906); *Chrystal Springs Land & Water Co.* v. *Los Angeles*, 177 U. S. 169 (1900) (claim that city is taking water in violation of treaty with Mexico and federal statute; held: no federal question is raised because the issue involves right under state or general law). Other cases were dismissed because the right alleged to have been denied was not directly "secured" by the Constitution. See, *e. g.*, *Carter* v. *Greenhow*, 114 U. S. 317 (1885), holding that an action for damages against a state tax collector did not state a cause of action under Rev. Stat. § 1979 because the right to pay taxes in coupons arose under state, rather than federal, law; and *Bowman* v. *Chicago & Northwestern R. Co.*, 115 U. S. 611 (1885), dismissing an appeal because the claim that a railroad had unlawfully refused to carry goods alleged denial of a right secured not by the Constitution, but if at all by a "principle of general law" governing the obligations of common carriers, *id.*, at 615. In *Holt* v. *Indiana Mfg. Co.*, 176 U. S. 68, 72 (1900), the Court held that a claim alleging that a tax on federal patent rights violated the Contracts, Due Process, and Equal Protection Clauses was not encompassed by Rev. Stat. §§ 1979 and 629 (16), or § 563 (12), because those provisions dealt only with "civil rights" claims, whether asserted under the Federal Constitution or federal statutes. Of course, this limited view of the nature of the constitutional rights encompassed by §§ 1983 and 1343 (3) has not been accepted in later cases, see n. 43, *infra*. Finally, *Giles* v. *Harris*, 189 U. S. 475 (1903), although holding that a federal court had no equitable power under Rev. Stat. § 1979 to order enrollment of blacks on a state voting list because, *inter alia*, voting involved "political rights," 189 U. S., at 487, did state that the claim that the right to vote had been denied was within § 1979, 189 U. S., at 485–486.

[28] See also *Burns* v. *Alcala*, 420 U. S. 575, 577 n. 1 (1975); *Rosado* v. *Wyman*, 397 U. S. 397, 404 n. 4 (1970); *King* v. *Smith*, 392 U. S. 309, 312 n. 3 (1968).

within the jurisdiction of the federal courts under § 1343. But we have not doubted the propriety of challenging under the "and laws" provision of § 1983 state action involving deprivation of federal statutory rights. On the very day the jurisdictional issue was reserved in *Hagans*, the Court stated in *Edelman* v. *Jordan*, 415 U. S. 651, 675 (1974):

> "It is, of course, true that *Rosado* v. *Wyman*, 397 U. S. 397 (1970), held that suits in federal court under § 1983 are proper to secure compliance with the provisions of the Social Security Act on the part of participating States."

And in *Greenwood* v. *Peacock*, 384 U. S. 808, 829–830 (1966), the Court noted that "[u]nder 42 U. S. C. § 1983 (1964 ed.) the [state] officers may be made to respond in damages not only for violations of rights covered by federal equal civil rights laws, but for violations of other federal constitutional and statutory rights as well." Other dicta recognizing that § 1983 encompasses statutory federal rights are found in *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658, 700–701 (1978);[29] *Mitchum* v. *Foster*, 407 U. S. 225, 239–240, n. 30 (1972);[30] *Lynch* v. *Household Finance Corp.*, 405 U. S. 538, 543 n. 7 (1972);[31] and *Hague* v. *CIO*, 307 U. S. 496, 525–526 (1939) (opinion of Stone, J.).[32]

Under the holding in *Hagans*, *supra*, at 536, that a federal court has power to hear a pendent claim based on the Social

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[29] "[T]here can be no doubt that § 1 of the Civil Rights Act [of 1871] was intended to provide a remedy to be broadly construed, against all forms of official violation of federally protected rights."

[30] "[Section 1983] in the Revised Statutes of 1874 was enlarged to provide protection for rights, privileges, or immunities secured by federal law as well [as those secured by the Constitution]."

[31] "[T]he provision in the Revised Statutes was enlarged to provide protection for rights, privileges, or immunities secured by federal law as well [as those secured by the Constitution]."

[32] "The right of action given by [§ 1 of the Civil Rights Act of 1871] was later . . . extended to include rights, privileges and immunities secured by the laws of the United States as well as by the Constitution."

Security Act when a substantial constitutional claim is also raised,[33] a cause of action for the pendent statutory claim must still be "authorized by law" in order for the claim to be cognizable in federal court under § 1343. That cause of action in *Hagans*, as in previous decisions of this Court that have reviewed the statutory claim, was provided by § 1983.

Likewise, our previous cases construing Rev. Stat. § 5508 (now 18 U. S. C. § 241) and Rev. Stat. § 5510 (now 18 U. S. C. § 242)—each of which describes the rights protected in language nearly identical to that used in § 1983[34]—leave no doubt that federal statutory as well as constitutional entitlements are encompassed thereby.

One of the first cases[35] construing what is now § 241 held that the rights "secured by the Constitution or laws" included homesteading rights granted in §§ 2289–2291 of the Revised Statutes. *United States* v. *Waddell*, 112 U. S. 76 (1884).[36] In

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[33] The Court does not question the continuing validity of *Hagans*. Indeed, the Court's remand in No. 77–719 leaves open the opportunity for respondents to seek to amend their complaint to allege, if they can, a nonfrivolous constitutional claim. Their statutory claim, on which suit is authorized by § 1983, would then qualify as a pendent claim within the jurisdiction of the District Court, as both *Rosado* and *Hagans* recognize.

[34] Title 18 U. S. C. §§ 241 and 242 encompass the same rights. See *United States* v. *Price*, 383 U. S. 787, 797 (1966); *United States* v. *Guest*, 383 U. S., at 753; *Screws* v. *United States*, 325 U. S. 91, 119 (1945) ("There are, however, no differences in the basic rights guarded [by §§ 241 and 242]") (opinion of Rutledge, J.).

[35] Another early case, *United States* v. *Cruikshank*, 92 U. S. 542 (1876), concerned convictions under what is now § 241 of persons accused of disrupting a meeting of blacks, and proceeding to lynch two of those who had been at the meeting. The Court held that because the right of peaceable assembly was an attribute of national citizenship, 92 U. S., at 551, rather than a right granted initially by the Constitution, deprivation of this right was not proscribed by the "Constitution or laws" language of § 6 of the Civil Rights Act of 1870.

[36] Three years later, the Court concluded that discrimination against Chinese in contravention of a treaty between the United States and China would be within the proscription of § 241 but for the language in that

Logan v. *United States*, 144 U. S. 263, 293–295 (1892), the Court was noticeably careful to hold that the right to be secure from unauthorized violence while in federal custody was secured "by the Constitution and laws of the United States." Accord, *In re Quarles*, 158 U. S. 532, 537–538 (1895). Moreover, subsequent decisions on the scope of §§ 241 and 242, examining issues not here relevant, have cited *Waddell*, *Logan*, and *Quarles* approvingly in the respect considered above. See *United States* v. *Mosley*, 238 U. S. 383, 386–387 (1915); *Screws* v. *United States*, 325 U. S. 91, 108–109 (1945) (opinion of Douglas, J.); *id.*, at 124–126, and n. 22 (opinion of Rutledge, J.); *United States* v. *Williams*, 341 U. S. 70, 80 (1951) (*Williams II*) (opinion of Frankfurter, J.); *United States* v. *Guest*, 383 U. S., at 771 (opinion of Harlan, J.); *id.*, at 759 n. 17; *United States* v. *Price*, 383 U. S., at 805 n. 18.

As noted, §§ 242 and 1983 were both derived from post-Civil War legislation providing redress for invasions of rights under color of state law. In the Revised Statutes of 1874, § 242 was expanded to encompass all constitutional rights, and both provisions were expanded to encompass rights secured by federal "laws." The color-of-law requirement in each is the same.[37] Apart from differences relating to the nature of the remedy invoked,[38] they are commensurate. See *Monroe* v. *Pape*, 365 U. S. 167, 183–185 (1961). Accordingly, I would hold with respect to 42 U. S. C. § 1983, as had been impliedly held with respect to 18 U. S. C. § 242, that the term "laws" encompasses all federal statutes. Like §§ 241 and 242, § 1983

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statute limiting its application to denials of the rights of "citizens." *Baldwin* v. *Franks*, 120 U. S. 678, 690–692 (1887); see also *id.*, at 694 (Harlan, J., dissenting).

[37] *Monroe* v. *Pape*, 365 U. S. 167, 185 (1961).

[38] Specific intent is required for conviction under either § 241 or § 242. *United States* v. *Guest*, *supra*, at 753–754; *Screws* v. *United States*, *supra*. The word "willfully" was added to § 242 in 1909, 35 Stat. 1092, but such language has never been in § 1983. See *Monroe* v. *Pape*, *supra*, at 206 (opinion of Frankfurter, J.).

must be deemed to have "dealt with Federal rights and with all Federal rights, and [to have] protected them in the lump." *United States* v. *Mosley, supra,* at 387. There can be "no basis whatsoever for a judgment of Solomon which would give to the statute less than its words command." *United States* v. *Price, supra,* at 803.

III

It is earnestly argued, however, that 42 U. S. C. § 1983, formerly Rev. Stat. § 1979, and 18 U. S. C. § 242, formerly Rev. Stat. § 5510, should be read as protecting against deprivation under color of state law only constitutional rights and rights granted under federal "equal rights" statutes. A corollary of this argument is that, although in 1874 Congress expressly invested the district courts with jurisdiction over all civil cases involving state interference with *any* right secured by the Constitution or by *any* federal law, see Rev. Stat. § 563 (12), Congress actually meant to refer, in addition to the Constitution, only to equal rights laws.

To the extent that these arguments are rooted in the notion that the 1866 Civil Rights Act provided the outer limits of the federal civil rights effort in the post-Civil War years, and thus implicitly limits the reach and scope of the relevant portions of the 1870 and 1871 Acts, they are quite unpersuasive. The 1870 Act, it is true, re-enacted the 1866 Act, but it also provided its own unique approaches, such as that adopted in § 6, proscribing private or public conspiracies interfering not merely with the specific rights of equality cataloged in § 1 of the 1866 Act, but with any right secured by federal constitutional or statutory law. Similarly, it cannot be supposed that in § 1 of the 1871 Act, Congress was merely granting a private cause of action for vindicating rights of equality with respect to enumerated activities within state legislative power, secured by § 1 of the 1866 Act, re-enacted as § 16 of the 1870 Act. The 1871 provision granted a remedy and jurisdiction in the federal courts to protect against state invasions of *any* and *all* constitutional rights; and whereas

this cause of action applied only to invasions under color of state law, the earlier provisions applied as against private persons as well, with federal jurisdiction to hear "all causes . . . affecting persons" denied the specific, enumerated rights. Thus, the very limiting construction urged of the term "and laws" as used in the Revised Statutes of 1874 cannot withstand scrutiny if predicated upon the proposition that the sole concern of the post-Civil War enactments was with vindicating particular rights of equality.

The more specific basis for the argument that the scope of § 1983 should be narrowed to less than its plain terms relates to the grant of civil rights jurisdiction to the circuit courts in the Revised Statutes. It is asserted that just as Congress limited the jurisdiction of those courts to suits involving constitutional rights or statutory rights secured in "equal rights" statutes, it intended likewise to confine the jurisdiction of the district courts under § 563 (12), the remedy provided by § 1979, and the criminal proscriptions in § 5510. However, the marginal notes and cross-references in the Revised Statutes for each of these provisions are as broad as the plain terms of the statutes themselves,[39] and at least as to the civil cause of action and criminal proscription against deprivation under color of state law, we know that the alteration in

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[39] The marginal notation for § 563 (12) states: "Suits to redress the deprivation of rights secured by the Constitution and laws to persons within jurisdiction of United States." Cross-cites are to § 1 of the 1871 Act, §§ 16, 18 of the 1870 Act, and § 3 of the 1866 Act; § 1 of the 1871 Act had referred to § 3 of the 1866 Act for the rules governing appeal and other matters, see n. 5, *supra*. In addition, there is a bracketed citation after the text of § 563 (12)—and after § 629 (16)—as follows: "[See §§ 1977, 1979]." Rev. Stat. 95, 111 (1874).

The marginal notation for § 1979 states: "Civil action for deprivation of rights." Section 1 of the 1871 Act is cross-cited, and there is a bracketed citation to § 563 and § 629. Rev. Stat. 348 (1874).

The marginal notation for § 5510 states: "Depriving citizens of civil rights under color of State laws." The cross-cite is to § 17 of the 1870 Act, and there is a bracketed citation to § 1979. Rev. Stat. 1074 (1874).

terms was noted on the floor of the Congress that enacted the Revised Statutes.[40] In fact, the marginal notations, as well as the entire statutory scheme, indicate that if an error was made at some point, it was not in the drafting of § 563 (12), § 1979, or § 5510, all of which employed broad terminology reaching federal statutes, but in the drafting of the circuit court provision. The marginal notation in the Revised Statutes for § 629 (16), like that for the district court provision, refers to "Suits to redress deprivation of rights secured by the Constitution *and laws* . . ." [41] (emphasis added), the language of §§ 1979 and 5510.

Nor do I find as unambiguous and as persuasive as does my Brother POWELL the commentary of the revisers published in 1872 in connection with the anticipated definition of the circuit court's jurisdiction. 1 Revision of the United States Statutes as Drafted by the Commissioners Appointed for that Purpose 359–363 (1872) (hereinafter Draft). The revisers went to some length to explain their deletion of the jurisdictional language used in § 3 of the 1866 Act (re-enacted by ref-

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[40] During the discussion of the Revised Statutes in Congress, Representative Lawrence read the relevant provisions of the post-Civil War Acts and then read § 1979. 2 Cong. Rec. 828–829 (1874). He went on to point out that whereas the version of § 5510 eventually enacted by Congress referred to rights secured by the "Constitution and laws," the revisers' initial version (that in the 1872 Draft) had referred only "to the deprivation of any right secured or protected by section —— of the title 'civil rights.'" Representative Lawrence explained that this initial version "certainly is not sufficiently comprehensive to include all covered by the first section of the 'Ku-Klux act' of April 20, 1871, and the omission is not elsewhere supplied . . . ." The foregoing demonstrates that the commensurate scope of §§ 1979 and 5510 was purposeful; further, apparently believing that § 1 of the 1871 Act, as well as § 2 of the 1866 Act and § 17 of the 1870 Act, defined crimes, Representative Lawrence noted: "[I]t is possible that the new consolidated section [§ 5510] may operate differently from the three original sections in a very few cases. But the change, if any, cannot be objectionable, but is valuable as securing uniformity." 2 Cong. Rec. 828 (1874).

[41] See Rev. Stat. 111 (1874).

erence in § 18 of the 1870 Act). The provision, in granting jurisdiction for "all causes, civil and criminal, affecting persons" denied rights, appeared, according to the revisers, to "allow every person who is denied any civil right in the courts of his own State to invoke the judicial power of the United States in every kind of controversy . . . ." 1 Draft 362. The revisers explained that a literal interpretation of such language "would involve consequences which Congress cannot be supposed to have intended . . . ," *id.*, at 361, and further questioned whether such a broad grant of jurisdiction was even within the limitations of Art. III, § 2, of the Constitution, which, they noted, extended federal judicial power only to cases *"arising under this Constitution, the laws of the United States,* and treaties . . . ." 1 Draft 362 (emphasis in original). Thus, instead of using the jurisdictional language in § 3 of the 1866 Act, the revisers decided to track the language in § 1 of the 1871 Act, which provided jurisdiction only for suits involving "deprivation" of rights, rather than for all suits involving persons denied rights.

However, the revisers drafting the circuit court provision were not working from the new, and expanded, cause of action provided in § 1979, but from § 1 of the 1871 Act, which, they pointed out, referred to deprivation of rights *"secured by the Constitution of the United States."* 1 Draft 362 (emphasis in original). If this language were transferred verbatim to the new circuit court jurisdictional provision, "it might perhaps be held that only such rights as are specifically secured by the Constitution, and not every right secured by a law authorized by the Constitution, were here intended . . . ." *Ibid.* Thus, the revisers thought it advisable—"deemed safer"—to include "a reference to the civil-rights act." My Brother POWELL is able to conclude from the foregoing [42] that

[42] The entire paragraph which for MR. JUSTICE POWELL provides the key to the revisers' view of the cause of action in § 1979 reads:

"It may have been the intention of Congress to provide, by [§ 1 of the 1871 Act], for all the cases of deprivations mentioned in the previous act

the only statutory rights the revisers had in mind—in §§ 1979 and 5510, as well as in the district and circuit court jurisdictional provisions—were those catalogued in § 16 of the 1870 Act, essentially a re-enactment of § 1 of the 1866 Act.

Beyond the most obvious and overriding difficulty with this approach to statutory construction—whereby the plain terms of three statutes are ignored on the basis of the revisers' commentary to a fourth and apparently inconsistent provision—there are several more technical problems with my Brother POWELL's approach. First, the reference ultimately included in the circuit court provision was not to § 16 of the 1870 Act, but to "any law providing for equal rights . . . ," a far broader reference than necessary to achieve what those writing the commentary apparently intended to achieve.

Second, if the revisers' comment is to be taken at face value, they must be held to have assumed that "every right secured by a law authorized by the Constitution" was secured by an "equal rights" statute, or even more incredibly, by § 16 of the 1870 Act. But surely my Brother POWELL cannot be suggesting that the Constitution is so limited, and such a narrow view of the constitutional rights protected by § 1983 has been firmly rejected by this Court.[43]

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of 1870, and thus actually to supersede the indefinite provision contained in that act. But as it might perhaps be held that only such rights as are specifically secured by the Constitution, and not every right secured by a law authorized by the Constitution, were here intended, it is deemed safer to add a reference to the civil-rights act." 1 Draft 362.

[43] See *Hague* v. *CIO*, 307 U. S. 496 (1939); *Monroe* v. *Pape*, 365 U. S. 167 (1961); *Lynch* v. *Household Finance Corp.*, 405 U. S. 538 (1972).

Unless he is also prepared to limit the reach of constitutional claims brought under § 1983, my Brother POWELL's construction of that statute would not allow claims based on federal statutory law to be heard unless they involved a right of equality, but claims based on the Constitution could involve alleged violations of not only the Equal Protection Clause, or even other provisions of the Fourteenth Amendment, but also any provision of the Constitution. It is hard to believe that Congress intended such asymmetry.

Third, if the revisers likewise intended only to accommodate the 1866 and 1870 Acts in the district court jurisdictional provision, § 563 (12), referring to rights secured by "any law of the United States" was a most peculiar and clumsy way of doing so.[44]

Fourth, if, as does indeed appear from the comment relied upon, it was the revisers' objective at least to provide jurisdiction for all suits alleging deprivation of the specific rights guaranteed in the 1866 and 1870 Acts, they failed in that attempt. Whereas § 3 of the 1866 Act had provided jurisdiction for suits alleging private, as well as color-of-law, deprivation of the rights enumerated, both § 629 (16) and § 563 (12), like § 1979, were limited to deprivations under color of state law.[45]

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[44] My three dissenting Brethren, concluding that § 1983 is the "equal rights" law referred to in § 1343 (3), do not attempt to explain the broader provision in § 563 (12) of the Revised Statutes. Moreover, the revisers who added the equal rights language to the circuit court jurisdictional provision did not have the expanded version of the cause of action, with its "and laws" language, before them. Thus, even if it might be considered that the term "providing for equal rights" was intended to be a reference to § 1 of the 1871 Act, that section encompassed only constitutional claims. Given this legislative history, the approach of the dissent, requires, at bottom, that the word "Constitution" as used in the 1871 Act encompass federal statutory claims. But if this were so, there would be no need to resort to the circuitous construction whereby § 1983 is the "equal rights" law of § 1343 (3).

[45] In addition, the Revised Statutes added a precondition to civil rights jurisdiction that was not included in other jurisdictional provisions: that the suit must be "authorized by law." See §§ 563 (12), 629 (16). See also §§ 563 (11), 629 (17), providing jurisdiction for civil suits "authorized by law" against conspiracies in violation of § 2 of the 1871 Act, see n. 13, *supra*, which section became, with modification, § 1980 of the Revised Statutes, and is the precursor of 42 U. S. C. § 1985. The "authorized by law" requirement, which remains in 28 U. S. C. § 1343, appears to be another effort to preclude suits merely "affecting" persons denied rights, because no cause of action was provided for such suits.

Clearly, §§ 1979 and 1980 were statutes "authorizing" suits. In addi-

In view of the foregoing ambiguities, contradictions, and uncertainties, there is no satisfactory basis for overriding the clear terms of the Revised Statutes. The "customary stout assertions" of the revisers notwithstanding, it is abundantly obvious that the 1874 revision did change the terms of certain remedial and jurisdictional provisions. Congress was well aware of the broadened scope of § 1 of the 1871 Civil Rights Act as redrafted in the Revised Statutes. And, for whatever reason, the limiting words in the circuit court jurisdictional provision were accepted and enacted by Congress; if there was a slip of the pen, it is more arguable that the mistake occurred here.[46]

Almost immediately, however, the circuit courts were given general federal-question jurisdiction, and in "codifying, revising, and amending" the laws relating to the judiciary in 1911,[47] there is no indication whatsoever that Congress acted in less than a knowing and deliberate way in confining the jursdiction of the district courts—where the amount-in-

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tion, it is evident that the revisers considered § 1 of the 1866 Act (and § 16 of the 1870 Act) directly to authorize suits redressing the deprivation of rights guaranteed thereunder, for the bracketed citations after the jurisdictional provisions, §§ 563 (12) and 629 (16), are to § 1977 as well as to § 1979, see n. 39, *supra*. This further supports the proposition that § 1 of the 1871 Act did not merely authorize civil suits to enforce the guarantees of the earlier Civil Rights Acts, see *supra*, at 663–664.

[46] It should also be noted that this was not the only instance in which the Revised Statutes of 1874 provided different circuit and district court jurisdiction for causes which, prior to the revision, could be heard in either court. The removal provision, § 641 of the Revised Statutes, provided for removal from a state court only to a circuit court even though the provision upon which § 641 was based, § 3 of the 1866 Act, provided for both district and circuit court jurisdiction. Congress also failed to provide for postjudgment removal in § 641, although such removal had been authorized under § 3 of the 1866 Act. See *Georgia* v. *Rachel*, 384 U. S. 780, 795 (1966).

[47] The legislation enacting the 1911 recodification provided that "the laws relating to the judiciary be, and they hereby are, codified, revised, and amended . . . to read as follows . . . ." 36 Stat. 1087.

controversy requirement was not met—to those color-of-law deprivations of rights secured by the Constitution or federal equal rights statutes.[48] The result is that since 1911, there have been some § 1983 suits not cognizable under § 1343 (3) and not cognizable in district court at all unless they involve the requisite jurisdictional amount under general federal-question jurisdiction. The effect of this amount-in-controversy prerequisite was and is to bar from the lower federal courts not only certain claims against state officers but also many private causes of actions not involving injury under color of law. Whatever the wisdom of precluding resolution of *all* federal-question cases in the federal courts—rather than leaving some of them to decision in the state courts (a course of action possibly in the process of being reversed by Congress) [49]—the uneven effect of this policy does not warrant refusal to recognize and apply the clear limiting language of § 1343 (3). Cf. *District of Columbia* v. *Carter*, 409 U. S. 418 (1973).

IV

The foregoing examination of the evolution of §§ 1983 and 1343 (3) demonstrates to my satisfaction that the two provisions cannot be read as though they were but one statute.[50]

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[48] See also Note, Federal Jurisdiction Over Challenges to State Welfare Programs, 72 Colum. L. Rev. 1404, 1423 (1972) ("Although the drafters of the 1911 Judicial Code may not have been particularly troubled by the substantive difference between sections 563 and 629, it seems unlikely that their choice of the circuit court language was inadvertent or arbitrary").

[49] See n. 6, *supra*.

[50] I also agree with the Court that 28 U. S. C. § 1343 (4) does not provide a basis for jurisdiction over the claims in these cases. Recognizing significant Court of Appeals authority to the contrary, see, *e. g.*, *Andrews* v. *Maher*, 525 F. 2d 113 (CA2 1975); *Randall* v. *Goldmark*, 495 F. 2d 356 (CA1 1974); *Aguayo* v. *Richardson*, 473 F. 2d 1090 (CA2 1973), cert. denied *sub nom. Aguayo* v. *Weinberger*, 414 U. S. 1146 (1974), recipients have not contended that the welfare rights here at stake are "civil rights" within the meaning of that statute. However, they urge that even if § 1983 can-

The manifest object of the Reconstruction Congress to provide a private remedy for deprivation under color of state law of federal rights is one reason I am disposed to give no less than full credit to the language of § 1983. However, this conclusion that federal statutory claims are appropriately brought under § 1983 does not proceed to any extent from the notion that this statute, by its terms or as perceived when enacted, "secure[s]" rights or "provide[s] for equal rights," in the language of § 1343 (3). Title 42 U. S. C. §§ 1981 and 1982, derived from § 1 of the 1866 Civil Rights Act and codified at §§ 1977 and 1978 of the Revised Statutes, enunciate certain rights and state that they are to be enjoyed on the same basis by all persons. Thus, these statutes both secure rights and provide for equal rights, whereas § 1983, derived from § 1 of the Civil Rights Act of 1871, provides only a cause of action—a remedy—for violations of federally protected rights.

Perhaps it could be said that the very process of judicial redress for deprivation of rights "secures" such rights and

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not be said to "provide" for equal rights within the meaning of § 1343 (3), this cause of action does operate to "protect" civil rights—by authorizing redress for their deprivation—within the meaning of § 1343 (4). Assuming, *arguendo*, the validity of this distinction, the cognizance of these claims under § 1983 is nonetheless insufficient to confer § 1343 (4) jurisdiction. To be sure, § 1983 actions are often brought to vindicate civil rights, and thus that section may loosely be characterized as a civil rights statute. However, under the view of that statute expressed in this opinion, the § 1983 cause of action is not always a civil rights cause of action, for it is appropriately invoked to vindicate *any* federal right against deprivation under color of state law. Indeed, as noted, recipients recognize that in the cases at hand, § 1983 is not being used to vindicate civil rights within the meaning of § 1343 (4). Therefore, in essence, recipients would have the Court transform statutory claims for welfare assistance into claims seeking "protection of civil rights" on the theory that such claims are encompassed by a statutory cause of action that in *other* cases is invoked to protect civil rights. Such logic is hardly compelling. The clear import of § 1343 (4) is to provide federal jurisdiction for civil rights claims, and no amount of bootstrapping can transform these claims for welfare assistance into civil rights claims.

"provides" that they shall be "equal" in the sense that they shall be enjoyed by all persons. I agree that without processes for their enforcement, the rights guaranteed in the Constitution and in federal statutes may not be fully realized. Further, provision of remedies for denial of rights to some persons is essential to realization of these rights for all persons. However, a remedy—a cause of action without more—guarantees neither equality nor underlying rights. It is, rather, a process for enforcing rights elsewhere guaranteed. The substantive scope of the rights which may be the basis for a cause of action within § 1343 (3) jurisdiction is limited to the Constitution and those federal statutes that guarantee equality of rights. The substantive scope of the rights which may be protected and vindicated under § 1983 against contrary state action, on the other hand, includes not only federal constitutional rights but also all rights secured by federal statutes unless there is clear indication in a particular statute that its remedial provisions are exclusive or that for various other reasons a § 1983 action is inconsistent with congressional intention.

MR. JUSTICE STEWART, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join,* dissenting.

My disagreement with the opinion and judgment of the Court in these cases is narrow but dispositive. Because 28 U. S. C. § 1343 (3) refers to "any Act of Congress providing for equal rights," because 42 U. S. C. § 1983 is such an Act of Congress, and because § 1983 by its terms clearly covers lawsuits such as the ones here involved, I would hold that the plaintiffs properly brought these cases in Federal District Court.[1]

*MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL do not join footnote 2.

[1] Accordingly, I do not reach the question whether jurisdiction may also exist by reason of § 1343 (4), or the Supremacy Clause argument. I do agree with the Court that the Social Security Act itself is not a

First of all, it seems to me clear that this Court has already settled the question whether § 1983 creates a cause of action for these plaintiffs. We have explicitly recognized that the case of *"Rosado* v. *Wyman,* 397 U. S. 397 (1970), held that suits in federal court under § 1983 are proper to secure compliance with the provisions of the Social Security Act on the part of participating States." *Edelman* v. *Jordan,* 415 U. S. 651, 675.[2] And a long line of this Court's cases necessarily stands for that proposition. *Miller* v. *Youakim,* 440 U. S. 125; *Quern* v. *Mandley,* 436 U. S. 725; *Van Lare* v. *Hurley,* 421 U. S. 338; *Edelman* v. *Jordan, supra; Hagans* v. *Lavine,* 415 U. S. 528; *Carleson* v. *Remillard,* 406 U. S. 598; *Jefferson* v. *Hackney,* 406 U. S. 535; *Carter* v. *Stanton,* 405 U. S. 669; *Townsend* v. *Swank,* 404 U. S. 282; *California Dept. of Human Resources* v. *Java,* 402 U. S. 121; *Dandridge* v.

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statute securing "equal rights" within § 1343 (3) or "civil rights" within § 1343 (4). Moreover, since the Court does not reach the merits in either of these cases, I see no need to discuss them, except to note that the result in No. 77–5324 is clearly controlled by *Quern* v. *Mandley,* 436 U. S. 725.

[2] Mr. Justice Black, joined by THE CHIEF JUSTICE, argued in dissent in *Rosado* v. *Wyman,* 397 U. S. 397, 430, that the plaintiff's claims should not be cognizable in a federal court. They argued that primary jurisdiction to consider whether state law comported with the Social Security Act should rest with the Department of Health, Education, and Welfare. The dissenting opinion did not suggest, however, that, apart from considerations of primary jurisdiction, no cause of action existed under § 1983.

Although the Court rejected the dissent's primary-jurisdiction argument for cases brought under the Social Security Act, a similar doctrine may restrict § 1983 suits brought for violations of other federal statutes. When a state official is alleged to have violated a federal statute which provides its own comprehensive enforcement scheme, the requirements of that enforcement procedure may not be bypassed by bringing suit directly under § 1983. For example, a suit alleging that a State has violated Title VII of the Civil Rights Act of 1964 must comply with the procedural requirements of that Act, even though such a suit falls within the language of § 1983.

Williams, 397 U. S. 471; *Rosado* v. *Wyman*, 397 U. S. 397; *King* v. *Smith*, 392 U. S. 309; *Damico* v. *California*, 389 U. S. 416. I think it is far too late in the day, therefore, to argue that the plaintiffs in these cases did not state causes of action cognizable in the federal courts.

Even if this impressive weight of authority did not exist, however, and the question before us were one of first impression, it seems clear to me that the plain language of § 1983 would dictate the same result. For that statute confers a cause of action for the deprivation under color of state law of "any rights . . . secured by the Constitution *and laws*." Only if the legislative history showed unambiguously that those words cannot mean what they say would it be possible to conclude that there were no federal causes of action in the present cases. But, as the Court correctly states, "the legislative history of the provisions at issue in these cases ultimately provides us with little guidance as to the proper resolution of the question presented here." *Ante*, at 610.

The Court's reading of §§ 1983 and 1343 (3) results in the conclusion that Congress intended § 1983 to create some causes of action which could not be heard in a federal court under § 1343 (3), even though §§ 1983 and 1343 (3) both originated in the same statute (§ 1 of the so-called Ku Klux Klan Act). This anomaly is quite contrary to the Court's understanding up to now that "the common origin of §§ 1983 and 1343 (3) in § 1 of the 1871 Act suggests that the two provisions were meant to be, and are, complementary." *Examining Board* v. *Flores de Otero*, 426 U. S. 572, 583. See *Lynch* v. *Household Finance Corp.*, 405 U. S. 538, 542–552.

Section 1983 is a statute "providing for equal rights." The Revised Statutes of 1874 included § 1979, the predecessor of § 1983, in Title XXIV, entitled "Civil Rights." Several sections in the Title, including § 1979, were cross-referenced to the predecessors of § 1343 (3), Rev. Stat. §§ 563 (12) and 629 (16). In the context of the Revised Statues, the term "pro-

viding for equal rights" found in § 629 (16) served to identify the sections of the Civil Rights Title which involved rights enforceable through civil actions.

The Court's reasoning to the contrary seems to rely solely on the fact that § 1983 does not create any rights. Section 1343 (3) does not require, however, that the Act create rights. Nor does it require that the Act "provide" them. It refers to any Act of Congress that provides "for" equal rights. Section 1983 provides for rights when it creates a cause of action for deprivation of those rights under color of state law. It is, therefore, one of the statutes for which § 1343 (3), by its terms, confers jurisdiction upon the federal district courts.

Today's decision may not have a great effect on the scope of federal jurisdiction. If the amount in controversy exceeds $10,000, any plaintiff raising a federal question may bring an action in federal court under 28 U. S. C. § 1331 (a). Many other sections of Title 28 confer jurisdiction upon the federal courts over statutory questions without any requirement that a monetary minimum be in controversy. See, *e. g.*, 28 U. S. C. § 1333 (admiralty and maritime jurisdiction); 28 U. S. C. § 1334 (bankruptcy); 28 U. S. C. § 1337 (Acts of Congress regulating commerce). Still other plaintiffs will find their way into the federal courts through jurisdictional provisions codified with the substantive law, and not incorporated in Title 28. See, *e. g.*, 12 U. S. C. § 2614 (Real Estate Settlement Procedures Act of 1974); 15 U. S. C. § 1640 (e) (Truth in Lending Act); 42 U. S. C. § 7604 (1976 ed., Supp. I) (Clean Air Act). Finally, even a welfare recipient with a federal statutory claim may sue in a federal court if his lawyer can link this claim to a substantial constitutional contention. And under the standard of substantiality established by *Hagans* v. *Lavine*, *supra*, such a constitutional claim would not be hard to construct.

But to sacrifice even one lawsuit to the Court's cramped reading of 28 U. S. C. § 1343 (3) is to deprive a plaintiff of a

federal forum without justification in the language or history of the law.

I respectfully dissent.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL believe that the issue discussed in footnote 2 of this dissenting opinion need not be addressed in this case. They therefore express no view of the merits of that particular question.

CANNON *v.* UNIVERSITY OF CHICAGO ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 77-926. Argued January 9, 1979—Decided May 14, 1979

Section 901 (a) of Title IX of the Education Amendments of 1972 (Title IX) provides in part that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." Petitioner instituted litigation in Federal District Court, alleging that she had been excluded from participation in the medical education programs of respondent private universities on the basis of her gender and that these programs were receiving federal financial assistance at the time of her exclusion. The District Court granted respondents' motions to dismiss the complaints since Title IX does not expressly authorize a private right of action by a person injured by a violation of § 901, and since the court concluded that no private remedy should be inferred. The Court of Appeals agreed that the statute did not contain an implied private remedy. It concluded, *inter alia*, that Congress intended the remedy in § 902 of Title IX, establishing a procedure for the termination of federal financial support for institutions that violated § 901, to be the exclusive means of enforcement, and that Title VI of the Civil Rights Act of 1964, upon which Title IX was patterned, did not include an implied private cause of action.

Held: Petitioner may maintain her lawsuit, despite the absence of any express authorization for it in Title IX. Pp. 688–717.

(a) Before concluding that Congress intended to make a remedy available to a special class of litigants, a court must carefully analyze the following four factors that *Cort* v. *Ash*, 422 U. S. 66, identifies as indicative of such an intent: (1) whether the statute was enacted for the benefit of a special class of which the plaintiff is a member, (2) whether there is any indication of legislative intent to create a private remedy, (3) whether implication of such a remedy is consistent with the underlying purposes of the legislative scheme, and (4) whether implying a federal remedy is inappropriate because the subject matter involves an area basically of concern to the States. P. 688.

(b) The first factor is satisfied here since Title IX explicitly confers a benefit on persons discriminated against on the basis of sex, and peti-

tioner is clearly a member of that class for whose special benefit the statute was enacted. Pp. 689–694.

(c) As to the second factor, the legislative history of Title IX rather plainly indicates that Congress intended to create a private cause of action. Title IX was patterned after Title VI of the Civil Rights Act of 1964, and the drafters of Title IX explicitly assumed that it would be interpreted and enforced in the same manner as Title VI, which had already been construed by lower federal courts as creating a private remedy when Title IX was enacted. Pp. 694–703.

(d) The third factor is satisfied, since implication of a private remedy will not frustrate the underlying purposes of the legislative scheme but, instead, will assist in achieving the statutory purpose of providing individual citizens effective protection against discriminatory practices. Pp. 703–708.

(e) As to the fourth factor, since the Civil War, the Federal Government and the federal courts have been the primary and powerful reliances in protecting citizens against invidious discrimination of any sort, including that on the basis of sex. Moreover, it is the expenditure of federal funds that provides the justification for this particular statutory prohibition. Pp. 708–709.

(f) Respondents' principal argument against implying a cause of action under Title IX—that it is unwise to subject admissions decisions of universities to judicial scrutiny at the behest of disappointed applicants on a case-by-case basis because this kind of litigation is burdensome and inevitably will have an adverse effect on the independence of members of university committees—is without merit. The congressional majorities that passed Title VI of the Civil Rights Act of 1964 and Title IX rejected the same argument when advanced by the congressional opponents of the two statutes, and there is nothing to demonstrate that private Title VI litigation has been so costly or voluminous that either the academic community or the courts have been unduly burdened, or that university administrators will be so concerned about the risk of litigation that they will fail to discharge their important responsibilities in an independent and professional manner. Pp. 709–710.

(g) Nor is there any merit to respondents' arguments, starting from the premise that Title IX and Title VI should receive the same construction, that a comparison of Title VI with other titles of the Civil Rights Act of 1964 demonstrates that Congress created express private remedies whenever it found them desirable, and that certain excerpts from the legislative history of Title VI foreclose the implication of a private remedy. The fact that other provisions of a complex statutory scheme create express remedies has not been accepted as a sufficient

reason, by itself, for refusing to imply an otherwise appropriate remedy under a separate section, and none of the excerpts from the legislative history cited by respondents evidences any hostility toward an implied private remedy for terminating the offending discrimination. Pp. 710–716.

559 F. 2d 1063, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which BRENNAN, STEWART, MARSHALL, and REHNQUIST, JJ., joined. REHNQUIST, J., filed a concurring opinion, in which STEWART, J., joined, *post*, p. 717. BURGER, C. J., concurred in the judgment. WHITE, J., filed a dissenting opinion, in which BLACKMUN, J., joined, *post*, p. 718. POWELL, J., filed a dissenting opinion, *post*, p. 730.

John M. Cannon argued the cause and filed briefs for petitioner.

Solicitor General McCree argued the cause for the federal respondents. With him on the briefs were *Assistant Attorney General Days, Deputy Solicitor General Wallace, Jessica Dunsay Silver,* and *Miriam R. Eisenstein.*

Stuart Bernstein argued the cause for respondents University of Chicago et al. With him on the brief were *Susan S. Sher* and *Thomas H. Morsch.**

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* Briefs of *amici curiae* urging reversal were filed by *Nancy Duff Campbell* and *Margaret A. Kohn* for the Federation of Organizations for Professional Women et al.; by *Carla A. Hills, William C. Kelly, Jr., Charles A. Bane, Thomas D. Barr, Norman Redlich, Robert A. Murphy,* and *Norman J. Chachkin* for the Lawyers' Committee for Civil Rights Under Law; by *Kent Hull* for the National Center for Law and the Handicapped, Inc., et al.; and by *Howard C. Westwood, Peter J. Nickles, Arnold Forster, Jeffrey P. Sinensky, Samuel Rabinove, Peter D. Roos, Richard A. Weisz, Roger S. Kuhn, William L. Taylor, Ronald B. Brown, Robert Hermann,* and *Nathaniel Jones* for the National Urban League et al.

Briefs of *amici curiae* urging affirmance were filed by *Laura Christian Ford* and *Joseph Anthony Keyes, Jr.*, for the American Council on Education et al.; by *Susan A. Cahoon, William A. Wright,* and *Douglas S. McDowell* for the Equal Employment Advisory Council; and by *John W. Barnett* and *Noel E. Hanf* for Yale University.

MR. JUSTICE STEVENS delivered the opinion of the Court.

Petitioner's complaints allege that her applications for admission to medical school were denied by the respondents because she is a woman.[1] Accepting the truth of those allegations for the purpose of its decision, the Court of Appeals held that petitioner has no right of action against respondents that may be asserted in a federal court. 559 F. 2d 1063. We granted certiorari to review that holding. 438 U. S. 914.

Only two facts alleged in the complaints are relevant to our decision. First, petitioner was excluded from participation in the respondents' medical education programs because of her sex. Second, these education programs were receiving federal financial assistance at the time of her exclusion. These facts, admitted *arguendo* by respondents' motion to dismiss the complaints, establish a violation of § 901 (a) of Title IX of the Education Amendments of 1972 (hereinafter Title IX).[2]

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[1] Each of petitioner's two complaints names as defendant a private university—the University of Chicago and Northwestern University—and various officials of the medical school operated by that university. In addition, both complaints name the Secretary, and the Region V Director of the Office for Civil Rights, of the Department of Health, Education, and Welfare. Although all of these defendants prevailed below, and are respondents here, the federal defendants have taken a position that basically accords with the position advanced by petitioner. See Brief for Federal Respondents. Unless otherwise clear in context, all references to respondents in this opinion will refer to the private defendants named in petitioner's complaints.

[2] Petitioner's complaints allege violations of various federal statutes including Title IX. Although the District Court and Court of Appeals ruled adversely on all of these theories, petitioner confined her petition for a writ of certiorari to the Title IX question. Pet. for Cert. 3. On that question, the District Court and Court of Appeals ruled favorably on respondents' motion to dismiss the complaints for failure to state a cause of action. See App. 22. Although respondents sought summary judgment simultaneously with their motion to dismiss, and submitted supporting affidavits, the courts below did not purport to rule on summary judgment or to make factual findings. Accordingly, all of the facts alleged

That section, in relevant part, provides:

"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the

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in petitioner's complaints must be taken as true for purposes of review.

According to her complaints, petitioner was qualified to attend both of the respondent medical schools based on both objective (*i. e.*, grade-point average and test scores) and subjective criteria. In fact, both schools admitted some persons to the classes to which she applied despite the fact that those persons had less impressive objective qualifications than she did. *Id.*, at 6–7, 12–13.

Both medical schools receive federal aid, *id.*, at 15–16, and both have policies against admitting applicants who are more than 30 years old (petitioner was 39 years old at the time she applied), at least if they do not have advanced degrees. *Id.*, at 7. Northwestern Medical School absolutely disqualifies applicants over 35. *Id.*, at 7 n. 3. These policies, it is alleged, prevented petitioner from being asked to an interview at the medical schools, so that she was denied even the opportunity to convince the schools that her personal qualifications warranted her admission in place of persons whose objective qualifications were better than hers. *Id.*, at 10, and n. 4, 11–12. Because the incidence of interrupted higher education is higher among women than among men, it is further claimed, the age and advanced-degree criteria operate to exclude women from consideration even though the criteria are not valid predictors of success in medical schools or in medical practice. *Id.*, at 7–11. As such, the existence of the criteria either makes out or evidences a violation of the medical school's duty under Title IX to avoid discrimination on the basis of sex. *Id.*, at 13. Petitioner also claimed that the schools accepted a far smaller percentage of women than their percentage in the general population and in the class of persons with bachelor's degrees. *Id.*, at 9. But cf. 559 F. 2d 1063, 1067, referring to statistics submitted by the University of Chicago in its affidavit accompanying its summary judgment motion indicating that the percentage of women admitted to classes from 1972 to 1975, 18.3%, was virtually identical to the percentage of women applicants. Of course, the dampening impact of a discriminatory rule may undermine the relevance of figures relating to *actual* applicants. See *Dothard* v. *Rawlinson*, 433 U. S. 321, 330.

Upon her rejection by both schools, petitioner sought reconsideration of the decisions by way of written and telephonic communications with admissions officials. Finding these avenues of no avail, she filed a complaint with the local office of HEW in April 1975, alleging, *inter alia*,

benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." [3]

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violations of Title IX. App. 16. Three months later, having received only an acknowledgment of receipt of her letter from HEW, petitioner filed suit in the District Court for the Northern District of Illinois against the private defendants. After she amended her complaints to include the federal defendants and requested injunctive relief ordering them to complete their investigation, she was informed that HEW would not begin its investigation of her complaint until early 1976. 559 F. 2d, at 1068, and n. 3; App. 49. In June 1976, HEW informed petitioner that the local stages of its investigation had been completed but that its national headquarters planned to conduct a further "in-depth study of the issues raised" because those issues were "of first impression and national in scope." App. to Pet. for Cert. A–35. As far as the record indicates, HEW has announced no further action in this case. See 559 F. 2d, at 1077.

[3] In relevant part, § 901, 86 Stat. 373, as amended, as set forth in 20 U. S. C. § 1681, provides:

"(a) . . . No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

"(1) . . . in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

"(2) . . . in regard to admissions to educational institutions, this section shall not apply (A) for one year from June 23, 1972, nor for six years after June 23, 1972, in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education or (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of only one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education, whichever is the later;

"(3) . . . this section shall not apply to an educational institution which

The statute does not, however, expressly authorize a private right of action by a person injured by a violation of § 901. For that reason, and because it concluded that no private remedy should be inferred, the District Court granted the respondents' motions to dismiss. 406 F. Supp. 1257, 1259.

The Court of Appeals agreed that the statute did not contain an implied private remedy. Noting that § 902 of Title IX establishes a procedure for the termination of federal financial support for institutions violating § 901, the Court of Appeals concluded that Congress intended that remedy to

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is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;

"(4) . . . this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine; [and]

"(5) . . . in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex.

. . . . . .

"(b) . . . Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: *Provided*, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

"(c) . . . For purposes of this chapter an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department."

be the exclusive means of enforcement.[4] It recognized that the statute was patterned after Title VI of the Civil Rights

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[4] Section 902, 86 Stat. 374, as set forth in 20 U. S. C. § 1682, provides:

"Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report."

Section 903 of Title IX, 86 Stat. 374, as set forth in 20 U. S. C. § 1683, provides for judicial review of actions taken under § 902:

"Any department or agency action taken pursuant to section 1682 of this title shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a

Act of 1964 (hereinafter Title VI),[5] but rejected petitioner's argument that Title VI included an implied private cause of action. 559 F. 2d, at 1071–1075.

After the Court of Appeals' decision was announced, Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 2641, which authorizes an award of fees to prevailing private parties in actions to enforce Title IX.[6] The

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finding of failure to comply with any requirement imposed pursuant to section 1682 of this title, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with chapter 7 of title 5, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of section 701 of that title."

[5] Section 601 of Title VI of the Civil Rights Act of 1964, 78 Stat. 252, 42 U. S. C. § 2000d, provides:

"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

[6] The Civil Rights Attorney's Fees Awards Act of 1976 amended 42 U. S. C. § 1988. That section, in relevant part, provides:

". . . In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX [of the Education Amendments of 1972], or in any civil action or proceedings, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

Respondents have argued that the amendment to § 1988 was merely intended to allow attorney's fees to the prevailing party in actions brought under the express provision in Title IX, 20 U. S. C. § 1683, quoted in n. 4, *supra*, authorizing alleged discriminators to obtain judicial review of Government decisions to cut off federal funds. See 559 F. 2d, at 1078. The legislative history of § 1988, as amended, belies this argument. The provision was clearly intended, *inter alia*, to allow awards of fees on behalf of "private" victims of discrimination who have successfully brought suit in court where authorized by the enumerated statutes:

"All of these civil rights laws [referred to in § 1988] depend heavily upon

court therefore granted a petition for rehearing to consider whether, in the light of that statute, its original interpretation of Title IX had been correct. After receiving additional briefs, the court concluded that the 1976 Act was not intended to create a remedy that did not previously exist.[7] The court

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private enforcement, and fee awards have proved an essential remedy if *private* citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain." S. Rep. No. 94–1011, p. 2 (1976) (emphasis added).

Furthermore, the attorney's fee amendment passed in 1976 was designed to expand the availability of § 718 of the Education Amendments of 1972, 20 U. S. C. § 1617, quoted in n. 25, *infra*, which unequivocally provides fees to litigants "other than the United States" who secure judicial relief against certain defendants for discrimination in violation of Title VI. Hence, although the language in §§ 718 and 1988 is not parallel, it appears that both authorize attorney's fees to certain private plaintiffs where the specified statute itself authorizes the relief sought by that plaintiff and the plaintiff proves his entitlement to such relief.

[7] We find nothing objectionable in this conclusion, as far as it goes. The legislative history quoted in the opinion of the Court of Appeals makes clear that the supporters of the legislation did not intend it to amend Title IX to include an express cause of action where none existed before. Instead, they clearly only meant to provide attorney's fees in the event that that statute as it had always existed implicitly created a cause of action. 559 F. 2d, at 1079–1080.

On the other hand, the language added to § 1988 by the 1976 amendment, and the legislative history surrounding it, do indicate that many "members of Congress may have assumed that private suits were authorized under" Title IX, 559 F. 2d, at 1079, and, more importantly, that many Members felt that private enforcement of Title IX was entirely consistent with, and even necessary to, the enforcement of Title IX and the other statutes listed in § 1988. In addition to reflecting this sentiment in the Senate Report on the 1976 amendment, see n. 6, *supra*, numerous legislators said as much on the floor of the two Houses:

"It is Congress[']s obligation to enforce the 14th amendment by eliminating entirely such forms of discrimination, and that is why both title VI of the Civil Rights Act of 1964 and title IX of the Education Amendments of 1972 have been included [in the amendment to § 1988]. As basic provisions of the civil rights enforcement scheme that Congress has created, it is essential that private enforcement be made possible by authorizing

also noted that the Department of Health, Education, and Welfare had taken the position that a private cause of action under Title IX should be implied,[8] but the court disagreed

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attorneys' fees in this essential area of the law." 122 Cong. Rec. 31472 (1976) (remarks of Sen. Kennedy).

See also *id.*, at 31471 (Sen. Scott); *id.*, at 31482 (Sen. Allen); *id.*, at 31832 (Sen. Hathaway); *id.*, at 33313 (Sen. Tunney); *id.*, at 33314 (Sen. Abourezk); *id.*, at 35122 (Rep. Drinan); *id.*, at 35125–35126 (Rep. Kastenmeier); *id.*, at 35127 (Rep. Holtzman); *id.*, at 35128 (Rep. Seiberling).

Although we cannot accord these remarks the weight of contemporary legislative history, we would be remiss if we ignored these authoritative expressions concerning the scope and purpose of Title IX and its place within "the civil rights enforcement scheme" that successive Congresses have created over the past 110 years.

[8] At least since September 17, 1974, HEW has taken the position that an implied cause of action does exist under Title IX in certain circumstances. Letter from HEW Assistant General Counsel Theodore A. Miles to Dr. Bernice Sandler (Sept. 17, 1974), reproduced in App. to Pet. for Cert. A–36 to A–38. See also Memorandum for United States as *Amicus Curiae* in *Lau* v. *Nichols*, O. T. 1973, No. 72–6520, p. 13 n. 5, in which the Justice Department on behalf of HEW took the position that an implied cause of action exists under Title VI; n. 31, *infra*. It is represented that "communication lapses between national and regional HEW offices" accounted for HEW's taking the contrary position throughout the early stages of this suit and until petitioner asked for rehearing before the Seventh Circuit. Brief for Federal Respondents 6 n. 9.

HEW's position on the interaction between the private cause of action that it recognizes and the administrative remedy provided by 20 U. S. C. § 1682 and HEW regulations was less clear until recently. In the Assistant General Counsel's 1974 letter mentioned above, the question of exhaustion of administrative remedies was raised but not answered. Since 1974, HEW has apparently never taken the position that exhaustion is required in every case. In submissions made to the Court in *Terry* v. *Methodist Hospital*, Civ. No. 76–373 (ND Ind.), however, the Department apparently took the position that it should always have the *opportunity* (*i. e.*, "primary jurisdiction") to exercise its expertise through the § 1682 process in advance of judicial consideration of a private suit. Statement in Support of HEW's Motion for Reconsideration, Oct. 13, 1977, pp. 6, 10. It was apparently contemplated that the administrative results would be due some amount of deference in subsequent private litigation. Later, HEW

with that agency's interpretation of the Act. In sum, it adhered to its original view, 559 F. 2d, at 1077–1080.

The Court of Appeals quite properly devoted careful attention to this question of statutory construction. As our recent cases—particularly *Cort* v. *Ash*, 422 U. S. 66—demonstrate, the fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person. Instead, before concluding that Congress intended to make a remedy available to a special class of litigants, a court must carefully analyze the four factors that *Cort* identifies as indicative of such an intent.[9] Our review of those factors persuades us, however,

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advanced the position that the choice lay with the alleged victim of discrimination, but that if that person initiated administrative proceedings prior to suit (as petitioner did here), the only judicial remedy would be through judicial review of the agency action. See *NAACP* v. *Wilmington Medical Center*, 453 F. Supp. 280, 300 (Del. 1978). Now, however, HEW, in conjunction with the Department of Justice, has rejected any strict-exhaustion, primary-jurisdiction, or election-of-remedies position in favor of a more flexible approach. In its view, a district court might choose to defer to the decision of the relevant administrative agency, if, unlike here, one has been reached in advance of trial, and it may wish to stay its hand upon request of HEW if an administrative investigation or informal negotiations are in progress and might be hampered by judicial action. See Brief for Federal Respondents 58–60, n. 36.

[9] "In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted,' *Texas & Pacific R. Co.* v. *Rigsby*, 241 U. S. 33, 39 (1916) (emphasis supplied)—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? See, *e. g.*, *National Railroad Passenger Corp.* v. *National Assn. of Railroad Passengers*, 414 U. S. 453, 458, 460 (1974) (*Amtrak*). Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? See, *e. g.*, *Amtrak*, *supra*; *Securities Investor Protection Corp.* v. *Barbour*, 421 U. S. 412, 423 (1975); *Calhoon* v. *Harvey*, 379 U. S. 134 (1964). And finally, is the cause of action one traditionally relegated to state law,

that the Court of Appeals reached the wrong conclusion and that petitioner does have a statutory right to pursue her claim that respondents rejected her application on the basis of her sex. After commenting on each of the four factors, we shall explain why they are not overcome by respondents' countervailing arguments.

I

First, the threshold question under *Cort* is whether the statute was enacted for the benefit of a special class of which the plaintiff is a member. That question is answered by looking to the language of the statute itself. Thus, the statutory reference to "any employee of any such common carrier" in the 1893 legislation requiring railroads to equip their cars with secure "grab irons or handholds," see 27 Stat. 532, 531, made "irresistible" the Court's earliest "inference of a private right of action"—in that case in favor of a railway employee who was injured when a grab iron gave way. *Texas & Pacific R. Co.* v. *Rigsby,* 241 U. S. 33, 40.[10]

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in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law? See *Wheeldin* v. *Wheeler,* 373 U. S. 647, 652 (1963); cf. *J. I. Case Co.* v. *Borak,* 377 U. S. 426, 434 (1964); *Bivens* v. *Six Unknown Federal Narcotics Agents,* 403 U. S. 388, 394–395 (1971); *id.,* at 400 (Harlan, J., concurring in judgment)." 422 U. S., at 78.

[10] In that case the Court stated:

"A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied, according to a doctrine of the common law expressed in 1 Com. Dig., *tit.* Action upon Statute (F), in these words: 'So, in every case, where a statute enacts, or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law.' (*Per* Holt, C. J., *Anon.,* 6 Mod. 26, 27.) This is but an application of the maxim, *Ubi jus ibi remedium.* See 3 Black. Com. 51, 123; *Couch* v. *Steel,* 3 El. & Bl. 402, 411; 23 L. J. Q. B. 121, 125." 241 U. S., at 39–40.

Similarly, it was statutory language describing the special class to be benefited by § 5 of the Voting Rights Act of 1965 [11] that persuaded the Court that private parties within that class were implicitly authorized to seek a declaratory judgment against a covered State. *Allen* v. *State Board of Elections*, 393 U. S. 544, 554–555.[12] The dispositive language in that statute—"no person shall be denied the right to vote for failure to comply with [a new state enactment covered by, but not approved under, § 5]"—is remarkably similar to the language used by Congress in Title IX. See n. 3, *supra*.

The language in these statutes—which expressly identifies the class Congress intended to benefit—contrasts sharply with statutory language customarily found in criminal statutes, such as that construed in *Cort*, *supra*, and other laws enacted for the protection of the general public.[13] There would be far

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[11] 42 U. S. C. § 1973c.

[12] The Court's entire explanation for inferring a private remedy was as follows:

"The Voting Rights Act does not explicitly grant or deny private parties authorization to seek a declaratory judgment that a State has failed to comply with the provisions of the Act. However, § 5 does provide that 'no person shall be denied the right to vote for failure to comply with [a new state enactment covered by, but not approved under, § 5].' Analysis of this language in light of the major purpose of the Act indicates that appellants may seek a declaratory judgment that a new state enactment is governed by § 5." 393 U. S., at 554–555 (footnotes omitted).

[13] Not surprisingly, the right- or duty-creating language of the statute has generally been the most accurate indicator of the propriety of implication of a cause of action. With the exception of one case, in which the relevant statute reflected a special policy against judicial interference, this Court has never refused to imply a cause of action where the language of the statute explicitly conferred a right directly on a class of persons that included the plaintiff in the case. See *Sullivan* v. *Little Hunting Park*, 396 U. S. 229, 238 (42 U. S. C. § 1982: "All citizens of the United States shall have the same right . . . as is enjoyed by white citizens thereof . . ."); *Allen* v. *State Board of Elections*, 393 U. S. 544 (42 U. S. C. § 1973c: "no person shall be denied the right to vote . . ."); *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409, 414–415, and n. 13 (same as in

less reason to infer a private remedy in favor of individual persons if Congress, instead of drafting Title IX with an unmistakable focus on the benefited class, had written it simply

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Sullivan, supra); *Tunstall* v. *Locomotive Firemen & Enginemen*, 323 U. S. 210, 213 (§ 2 Fourth of the Railway Labor Act: "Employees shall have the right to organize and bargain collectively through representatives . . ."); *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192, 199 (same); *Virginian R. Co.* v. *Railway Employees*, 300 U. S. 515, 545 (§ 2 Ninth of the Railway Labor Act: "the carrier shall treat with the *representative* so certified" (emphasis added)); *Texas & N. O. R. Co.* v. *Railway Clerks*, 281 U. S. 548, 567–570 (§ 2 Third of the Railway Labor Act: "Representatives . . . shall be designated by the respective *parties* . . . without interference, influence, or coercion exercised by either party . . ." (emphasis added)); *Texas & Pacific R. Co.* v. *Rigsby*, 241 U. S. 33, 40 (27 Stat. 532: "any employee of any such common carrier"). Analogously, the Court has implied causes of action in favor of the United States in cases where the statute creates a duty in favor of the public at large. See *Wyandotte Transportation Co.* v. *United States*, 389 U. S. 191, 200–202 (33 U. S. C. § 409: "It shall not be lawful [to obstruct navigable waterways]"); *United States* v. *Republic Steel Corp.*, 362 U. S. 482 (same).

The only case that deviates from this pattern is *Santa Clara Pueblo* v. *Martinez*, 436 U. S. 49, which involved Title I of the Indian Civil Rights Act of 1968, 25 U. S. C. § 1302 (8): "No Indian tribe . . . shall deny to any person within its jurisdiction the equal protection of its laws." *Martinez*, however, involved an attempt to imply a cause of action in a virtually unique situation—*i. e.*, against an Indian tribe, protected by a strong presumption of autonomy and self-government, as well as by a special duty on the part of the Federal Government to deal fairly and openly, and by a legislative history indicative of an intent to limit severely judicial interference in tribal affairs. 436 U. S., at 55, 58–59, 63–64, 67–70, and n. 30. In this situation, the fourth *Cort* factor was brought into special play. The *Martinez* Court determined that the strong presumption against implication of federal remedies where they might interfere with matters "traditionally relegated to state law," *Cort*, 422 U. S., at 78, was equally applicable in circumstances where the federal remedies would interfere with matters traditionally relegated to the control of semisovereign Indian tribes.

Even *Martinez*, however, "recognized the propriety of inferring a federal cause of action for the enforcement of civil rights, even when Congress has spoken in purely declarative terms." 436 U. S., at 61; see *Sullivan* v.

as a ban on discriminatory conduct by recipients of federal funds or as a prohibition against the disbursement of public

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Little Hunting Park, supra, at 238; *Allen* v. *State Board of Elections, supra; Jones* v. *Alfred H. Mayer Co., supra,* at 414 n. 13. This principle, which is directly applicable in the present Title IX context, is but a manifestation of the pattern noted above because a statute declarative of a civil right will almost have to be stated in terms of the benefited class. Put somewhat differently, because the right to be free of discrimination is a "personal" one, see, *e. g., Teamsters* v. *United States,* 431 U. S. 324, 361–372; *Franks* v. *Bowman Transportation Co.,* 424 U. S. 747, 772, a statute conferring such a right will almost have to be phrased in terms of the persons benefited.

Conversely, the Court has been especially reluctant to imply causes of actions under statutes that create duties on the part of persons for the benefit of the public at large. See *Piper* v. *Chris-Craft Industries,* 430 U. S. 1 ("unlawful" conduct); *Cort* v. *Ash, supra* ("unlawful" conduct); *Securities Investor Protection Corp.* v. *Barbour,* 421 U. S. 412 (duty of SIPC to "discharge its obligations"); *National Railroad Passenger Corp.* v. *National Assn. of Railroad Passengers,* 414 U. S. 453 (forbidding "action, practice, or policy inconsistent" with the Amtrak Act); *Wheeldin* v. *Wheeler,* 373 U. S. 647 (setting procedure for procuring congressional subpoena); *T. I. M. E. Inc.* v. *United States,* 359 U. S. 464 ("duty of every common carrier . . . to establish . . . just and reasonable rates . . ."); *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.,* 341 U. S. 246 (similar duty of gas pipeline companies). The Court has deviated from this pattern on occasion. See *J. I. Case Co.* v. *Borak,* 377 U. S. 426 (implying a cause of action under a securities provision describing "unlawful" conduct); *Superintendent of Insurance* v. *Bankers Life & Cas. Co.,* 404 U. S. 6, 13 n. 9 (implying a cause of action under Securities and Exchange Commission Rule 10b–5, which describes certain unlawful manipulative conduct in the securities area); *Machinists* v. *Central Airlines,* 372 U. S. 682 (implied cause of action under section of the Railway Labor Act creating a "duty" on the part of common carriers to establish boards of adjustment). At least the latter two cases can be explained historically, however. In *Superintendent of Insurance,* the Court explicitly acquiesced in the 25-year-old acceptance by the lower federal courts of a Rule 10b–5 cause of action. See also *Ernst & Ernst* v. *Hochfelder,* 425 U. S. 185, 196; *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U. S. 723, 730. In *Machinists,* the Court explicitly followed the lead of various earlier cases in which it had implied causes of actions under various sections of the Railway Labor Act, albeit where the statutory provisions more explicitly

funds to educational institutions engaged in discriminatory practices.[14]

Unquestionably, therefore, the first of the four factors identified in *Cort* favors the implication of a private cause of

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identified a class of benefited persons. See *Tunstall, supra; Steele, supra; Virginian R. Co., supra; Texas & N. O. R. Co., supra.*

[14] In adopting Title IX in its present form, in fact, Congress passed over an alternative proposal, offered by Senator McGovern as an amendment to the Higher Education Act of 1965, that was phrased quite differently—as a simple directive to the Secretary of HEW:

"PROHIBITION AGAINST SEX DISCRIMINATION

"Sec. 1206. (a) The Secretary shall not make any grant, loan guarantee, or interest subsidy payment, nor shall the Secretary enter into any contract with any institution of higher education, or any other postsecondary institution, center, training center, or agencies representing such institutions unless the application, contract, or other arrangement for the grant, loan guarantee, interest subsidy payment, or other financial assistance contains assurances satisfactory to the Secretary that any such institution, center, or agency will not discriminate on the basis of sex in the admission of individuals to any program to which the application, contract, or other arrangement is applicable." 117 Cong. Rec. 30411 (1971).

In this connection, it is also interesting to note that as originally introduced Title VI of the Civil Rights Act of 1964, after which Title IX was explicitly patterned, see n. 16, *infra*, was also phrased as a directive to federal agencies engaged in the disbursement of public funds:

"TITLE VI—NONDISCRIMINATION IN FEDERALLY ASSISTED PROGRAMS

"Sec. 601. Notwithstanding any provision to the contrary in any law of the United States providing or authorizing direct or indirect financial assistance for or in connection with any program or activity by way of grant, contract, loan, insurance, guaranty, or otherwise, no such law shall be interpreted as requiring that such financial assistance shall be furnished in circumstances under which individuals participating in or benefiting from the program or activity are discriminated against on the ground of race, color, religion, or national origin or are denied participation or benefits therein on the ground of race, color, religion, or national origin. All contracts made in connection with any such program or activity shall contain such conditions as the President may prescribe for the purpose of assuring that there shall be no discrimination in employment by any

action. Title IX explicitly confers a benefit on persons discriminated against on the basis of sex, and petitioner is clearly a member of that class for whose special benefit the statute was enacted.

Second, the *Cort* analysis requires consideration of legislative history. We must recognize, however, that the legislative history of a statute that does not expressly create or deny a private remedy will typically be equally silent or ambiguous on the question. Therefore, in situations such as the present one "in which it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to *create* a private cause of action, although an explicit purpose to *deny* such cause of action would be controlling." *Cort*, 422 U. S., at 82 (emphasis in original).[15] But this is not the typical case. Far from evidencing any purpose to *deny* a private cause of action, the history of Title IX rather plainly indicates that Congress intended to create such a remedy.

Title IX was patterned after Title VI of the Civil Rights Act of 1964.[16] Except for the substitution of the word "sex"

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contractor or subcontractor on the ground of race, color, religion, or national origin." S. 1731, 88th Cong., 1st Sess. (1963).

After Senators Keating and Ribicoff raised objections to the bill on the ground that it did not expressly authorize a private remedy for a person against whom discrimination had been practiced, the Department of Justice submitted a revised bill which contained the language now found in § 601. See Hearings before the Senate Committee on the Judiciary on S. 1731 and S. 1750, 88th Cong., 1st Sess., 334–335, 349–352 (1963); *infra*, at 713–716.

[15] See also *Santa Clara Pueblo* v. *Martinez*, 436 U. S., at 79 (WHITE, J., dissenting).

[16] "This is identical language, specifically taken from title VI of the 1964 Civil Rights Act . . . ." 117 Cong. Rec. 30407 (1971) (Sen. Bayh—Senate sponsor). Accord, *id.*, at 30408 ("We are only adding the 3-letter word 'sex' to existing law") (Sen. Bayh); *id.*, at 39256 (Rep. Green—House sponsor); 118 Cong. Rec. 5803, 5807, 18437 (1972) (Sen. Bayh).

The genesis of Title IX also bears out its kinship with Title VI. In

in Title IX to replace the words "race, color, or national origin" in Title VI, the two statutes use identical language to describe the benefited class.[17] Both statutes provide the

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the summer of 1970, Representative Edith Green of Oregon, who later sponsored Title IX on the floor of the House during the debates in 1971 and 1972, chaired a set of hearings on "Discrimination Against Women." Hearings before the Special Subcommittee on Education of the House Committee on Education and Labor on § 805 of H. R. 16098, 91st Cong., 2d Sess. (1970). Under consideration was a section of a pending bill, H. R. 16098, that would simply have added the word "sex" to the list of discriminations prohibited by § 601 of Title VI. See Hearings, *supra*, at 1. During the course of the hearings, which were repeatedly relied upon in both Houses during the subsequent debates on Title IX, it became clear that educational institutions were the primary focus of complaints concerning sex discrimination. See, *e. g.*, *id.*, at 5, 237, 584. In order to conform to that focus, and in order to respond to criticism that certain federally funded programs were properly operating on a single-sex basis (for example, undergraduate colleges and homes for disturbed children), witnesses at the hearings, including representatives of the Justice Department and of the United States Commission on Civil Rights, proposed that a special provision be drawn up that was parallel to, but somewhat more limited than, Title VI. *Id.*, at 664–666, 677–678, 690–691.

Although H. R. 16098 never made it through the House, its sex discrimination provision was lifted from it, modified along the lines suggested in the 1970 hearings, and included in the House Resolution that was amended and adopted by the House as its version of what became the Education Amendments of 1972. H. R. 32, 92d Cong., 1st Sess., Title X. Of note here, this House proposal was originally phrased as an amendment to Title VI that would have made § 601 of that Title into § 601 (a), and would have added the gist of what is now Title IX as § 601 (b). H. R. 32, *supra*. After further modifications not relevant here, this proposal was removed from its Title VI moorings, passed by the House, and further modified, and then passed, by the Senate in a form that was adopted by the Conference Committee. See S. Conf. Rep. No. 92–798, pp. 221–222 (1972).

[17] The pertinent provisions of Titles IX and VI are quoted in nn. 3 and 5, *supra*. Although Title IX is applicable only to certain educational institutions receiving federal financial assistance, Title VI is applicable to additional institutions such as hospitals, highway departments, and housing authorities.

same administrative mechanism for terminating federal financial support for institutions engaged in prohibited discrimination.[18] Neither statute expressly mentions a private remedy for the person excluded from participation in a federally funded program. The drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been during the preceding eight years.[19]

In 1972 when Title IX was enacted, the critical language in Title VI had already been construed as creating a private remedy. Most particularly, in 1967, a distinguished panel of the Court of Appeals for the Fifth Circuit squarely decided this issue in an opinion that was repeatedly cited with approval and never questioned during the ensuing five years.[20] In addition, at least a dozen other federal courts reached similar conclusions in the same or related contexts during those years.[21] It is always appropriate to assume that our

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[18] See n. 4, *supra*.

[19] "The same [enforcement] procedure that was set up and has operated with great success under the 1964 Civil Rights Act, and the regulations thereunder[,] would be equally applicable to discrimination [prohibited by Title IX]." 117 Cong. Rec. 30408 (1971) (Sen. Bayh). Accord, 118 Cong. Rec. 5807 (1972) (Sen. Bayh); *id.*, at 18437 (Sen. Bayh) ("[E]nforcement of [Title IX] will draw heavily on these precedents" under the Civil Rights Act of 1964).

[20] *Bossier Parish School Board* v. *Lemon*, 370 F. 2d 847, 852 (CA5 1967), cert. denied, 388 U. S. 911. The panel included Judge Wisdom, who wrote the opinion, and then Judge (now CHIEF JUSTICE) Burger, sitting by designation, and then Judge (now Chief Judge) Brown. *Bossier* was relied on in, *e. g.*, *Southern Christian Leadership Conference, Inc.* v. *Connolly*, 331 F. Supp. 940 (ED Mich. 1971); *Gautreaux* v. *Chicago Housing Authority*, 265 F. Supp. 582 (ND Ill. 1967).

[21] In addition to the Fifth Circuit in *Bossier*, at least four other federal courts explicitly relied on Title VI as the basis for a cause of action on the part of a private victim of discrimination against the alleged discriminator. See *Blackshear Residents Org.* v. *Housing Authority of Austin*, 347 F. Supp. 1138, 1146 (WD Tex. 1972); *Hawthorne* v. *Kenbridge Recreation Assn.*, 341 F. Supp. 1382, 1383–1384 (ED Va. 1972); *Gautreaux* v. *Chicago*

elected representatives, like other citizens, know the law; in this case, because of their repeated references to Title VI and its modes of enforcement, we are especially justified in presuming both that those representatives were aware of the

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Housing Authority, supra; Lemon v. *Bossier Parish School Board,* 240 F. Supp. 709, 713 (WD La. 1965), aff'd, 370 F. 2d 847 (CA5 1967).

Although 42 U. S. C. § 1983 might have provided an alternative and express cause of action in some of these cases—had it been relied upon—see generally *Chapman* v. *Houston Welfare Rights Org., ante,* p. 600, that section was certainly not available in *Kenbridge, supra,* involving a private defendant. Moreover, § 1983 was clearly unavailable (and no other express cause of action such as is provided in the Administrative Procedure Act was relied upon) in four other pre-1972 cases that either expressly or impliedly found causes of action under Title VI in a somewhat different context than is involved in this case. Thus, private plaintiffs successfully sued officials of the Federal Government under Title VI, and secured orders requiring those officials either to aid recipients of federal funds in devising nondiscriminatory alternatives to presently discriminatory programs, or to cut off funds to those recipients. See *Gautreaux* v. *Romney,* 448 F. 2d 731, 737–740 (CA7 1971), later appeal, *Gautreaux* v. *Chicago Housing Authority,* 503 F. 2d 930 (CA7 1974), aff'd *sub nom. Hills* v. *Gautreaux,* 425 U. S. 284; *Shannon* v. *HUD,* 436 F. 2d 809, 820 (CA3 1970) (explicit discussion of cause of action); *Southern Christian Leadership Conference, Inc.* v. *Connolly, supra,* at 943–945 (explicit discussion of cause of action); *Hicks* v. *Weaver,* 302 F. Supp. 619, 622–623 (ED La. 1969).

Finally, several other pre-1972 decisions relied on Title VI as a basis for relief in favor of private litigants, although with language suggesting that § 1983 may have provided the cause of action. See *Alvarado* v. *El Paso Independent School Dist.,* 445 F. 2d 1011 (CA5 1971); *Nashville I–40 Steering Committee* v. *Ellington,* 387 F. 2d 179, 181 (CA6 1967), cert. denied, 390 U. S. 921; *Anderson* v. *San Francisco Unified School Dist.,* 357 F. Supp. 248 (ND Cal. 1972); *McGhee* v. *Nashville Special School Dist. No. 1,* 11 Race Rel. L. Rep. 698 (WD Ark. 1966).

See also *Gautreaux* v. *Chicago Housing Authority,* 436 F. 2d 306 (CA7 1970) (dicta), cert. denied, 402 U. S. 922; *Gautreaux* v. *Chicago Housing Authority,* 296 F. Supp. 907 (ND Ill. 1969) (dicta); *Rolfe* v. *County Board of Education,* 282 F. Supp. 192 (ED Tenn. 1966) (dicta), aff'd, 391 F. 2d 77 (CA6 1968).

prior interpretation of Title VI and that that interpretation reflects their intent with respect to Title IX.

Moreover, in 1969, in *Allen* v. *State Board of Elections*, 393 U. S. 544, this Court had interpreted the comparable language in § 5 of the Voting Rights Act as sufficient to authorize a private remedy.[22] Indeed, during the period between the enactment of Title VI in 1964 and the enactment of Title IX in 1972, this Court had consistently found implied remedies—often in cases much less clear than this.[23] It was *after* 1972 that this Court decided *Cort* v. *Ash* and the other cases cited by the Court of Appeals in support of its strict construction of the remedial aspect of the statute.[24] We, of course, adhere to the strict approach followed in our recent cases, but our evaluation of congressional action in 1972 must take into

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[22] In fact, Congress enacted Title IX against a backdrop of three recently issued implied-cause-of-action decisions of this Court involving civil rights statutes with language similar to that in Title IX. In all three, a cause of action was found. See *Sullivan* v. *Little Hunting Park*, 396 U. S. 229; *Allen; Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409. See generally n. 13, *supra*.

[23] In the decade preceding the enactment of Title IX, the Court decided six implied-cause-of-action cases. In all of them a cause of action was found. *Superintendent of Insurance* v. *Bankers Life & Cas. Co.*, 404 U. S. 6; *Sullivan* v. *Little Hunting Park, supra; Allen; Jones* v. *Alfred H. Mayer Co., supra; Wyandotte Transportation Co.* v. *United States*, 389 U. S. 191; *J. I. Case Co.* v. *Borak*, 377 U. S. 426. See generally n. 13, *supra*.

[24] The Court of Appeals relied on *National Railroad Passenger Corp.* v. *National Assn. of Railroad Passengers*, 414 U. S. 453; *Securities Investor Protection Corp.* v. *Barbour*, 421 U. S. 412; and *Cort* v. *Ash*. In subsequent cases, the Court has continued to give careful attention to claims that a private remedy should be implied in statutes which omit any express remedy. See *Santa Clara Pueblo* v. *Martinez*, 436 U. S. 49; *Piper* v. *Chris-Craft Industries*, 430 U. S. 1. The Court's decidedly different approach since 1972 to cause of action by implication has not gone without scholarly notice. *E. g.*, Pitt, Standing to Sue Under the Williams Act After *Chris-Craft:* A Leaky Ship on Troubled Waters, 34 Bus. Law. 117, 120, 162 (1978).

account its contemporary legal context. In sum, it is not only appropriate but also realistic to presume that Congress was thoroughly familiar with these unusually important precedents from this and other federal courts and that it expected its enactment to be interpreted in conformity with them.

It is not, however, necessary to rely on these presumptions. The package of statutes of which Title IX is one part also contains a provision whose language and history demonstrate that Congress itself understood Title VI, and thus its companion, Title IX, as creating a private remedy. Section 718 of the Education Amendments authorizes federal courts to award attorney's fees to the prevailing parties, other than the United States, in private actions brought against public educational agencies to enforce Title VI in the context of elementary and secondary education.[25] The language of this provision explicitly presumes the availability of private suits to enforce Title VI in the education context.[26] For many such

[25] Section 718, 86 Stat. 369, is codified in 20 U. S. C. § 1617:

"Upon the entry of a final order by a court of the United States against a local educational agency, a State (or any agency thereof), or the United States (or any agency thereof), for failure to comply with any provision of this title or for discrimination on the basis of race, color, or national origin in violation of title VI of the Civil Rights Act of 1964, or the fourteenth amendment to the Constitution of the United States as they pertain to elementary and secondary education, the court, in its discretion, upon a finding that the proceedings were necessary to bring about compliance, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

This section was a portion of Title VII of the Education Amendments of 1972, also known as the Emergency School Aid Act. Under this Act federal funds are made available to elementary and secondary schools that are going through the process of court-ordered or voluntary desegregation. See § 702 of the Act, 20 U. S. C. § 1601.

[26] See S. Conf. Rep. No. 92-798, p. 218 (1972): "*Attorney fees.*—The Senate amendment, but not the House amendment, authorized the payment of attorneys fees to successful plaintiffs in suits brought for violation of . . . Title VI of the Civil Rights Act . . . . The conference substitute contains this provision." See also n. 6, *supra*.

suits, no express cause of action was then available; hence Congress must have assumed that one could be implied under Title VI itself.[27] That assumption was made explicit during the debates on § 718.[28] It was also aired during the debates

[27] Although there is nothing in the statute or legislative history that says as much, it may be that Congress expected 42 U. S. C. § 1983 to provide an explicit cause of action for some of the suits contemplated by § 718. But § 1983 is assuredly not available for suits against the United States, nor at the time § 718 was passed was it available for suits against "a State (or any agency thereof)," nor even perhaps for suits against a "local educational agency." See *Mt. Healthy City Board of Education* v. *Doyle*, 429 U. S. 274, 277–278; *Monroe* v. *Pape*, 365 U. S. 167. Cf. *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658. Section 718 has been interpreted liberally by the federal courts. *E. g.*, *Norwood* v. *Harrison*, 410 F. Supp. 133 (ND Miss. 1976), appeal dism'd, 563 F. 2d 722 (CA5 1977).

[28] "Mr. President, it is said that [§ 718] will encourage litigation in the South . . . .

"I can only say that what [§ 718] does, in essence, is that it says a party is entitled to pursue his remedy if there is a violation [of Title VII of the Education Amendments of 1972], if there is a violation of the 1964 Civil Rights Act, if there is a violation of the 14th amendment to the Constitution of the United States. It says that, in the discretion of the court, if a mandate comes down, if a judgment is rendered, and if it was necessary to bring the action to see to it that the act was enforced, [the court] could allow the cost and a reasonable fee for time expended. That is the extent of it." 117 Cong. Rec. 11725–11726 (1971) (Sen. Cook).

In light of the language of § 718, see n. 25, *supra*, it is, of course, clear that Senator Cook's reference to "the 1964 Civil Rights Act" means Title VI of the Act. Accord, 117 Cong. Rec. 11338 (1971) (Sen. Dominick); *id.*, at 11340 (Sen. Mondale); *id.*, at 11524 (Sen. Allen); *id.*, at 11527–11528 (Sen. Cook).

These same debates provide another important indication that Congress presumed that, wherever necessary, private causes of action must exist in order to justify the suits contemplated by § 718. Section 718 provides attorney's fees in suits seeking compliance with three separate provisions—the Constitution, Title VI, and § 718's sister provisions in Title VII of the Education Amendments of 1972. None of the last-mentioned sister provisions contains an express cause of action. Section 718 also contemplates three types of defendants in those suits—local educational agencies, States and state agencies, and the Federal Government. In exploring the mean-

on other provisions in the Education Amendments of 1972 [29] and on Title IX itself,[30] and is consistent with the Executive Branch's apparent understanding of Title VI at the time.[31]

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ing of the provision, the question arose as to what might occur if a private litigant attempted to sue the Federal Government to force compliance with Title VII of the Education Amendments of 1972. The following colloquy took place:

"Mr. COOK. [I]f the Federal Government is defendant, and if the Federal Government is found guilty of violation of this act [Title VII of the Education Amendments of 1972], and it is in fact discriminating, then it is conceivable that the attorney's fees and the costs could go against the Federal Government.

"Mr. PELL. But can an individual sue the Federal Government?

"Mr. COOK. Under this title?

"Mr. PELL. Yes.

"Mr. COOK. Oh yes."

[29] The question of busing to achieve racial balance caused considerable debate during consideration of the Education Amendments of 1972. During those debates, it was proposed that the jurisdiction of the federal courts be limited to prevent them from ordering such busing. In defending federal jurisdiction in this area, the opponents of the proposal described the courts as an important, even the most important, reliance in the enforcement of Title VI. For example, Senator Javits stated: "We cannot simply strike down these [judicial] enforcement powers without effectively striking down title VI of the Civil Rights Act of 1964." 118 Cong. Rec. 5483 (1972). See also *id.*, at 7558–7559; *id.*, at 7561 (Rep. Stokes) ("The busing furor is a symptom, like pain, of the effort which has been made to carry out the mandate of Brown against Board of Education and Title VI of the Civil Rights Act. Busing has been used successfully in many communities. The courts have required it because it works").

[30] Senator Bayh, for example, explained that the time limits provided in Title IX for undergraduate institutions that chose to become coeducational after previously being single sex, § 901 (a)(2)(A), 20 U. S. C. § 1681 (a)(2)(A), are "consistent with the type of timetable that has been set in the past by *court decisions* under Title VI of the 1964 Civil Rights Act in other areas of discrimination." 117 Cong. Rec. 30409 (1971) (emphasis added). See also *id.*, at 30404 (Sen. Bayh); *id.*, at 30407 (Sen. Javits).

[31] In 1965, the Justice Department intervened on behalf of the private litigants in the *Bossier* litigation, which resulted in the first two judicial

Finally, the very persistence—before 1972 and since, among judges and executive officials, as well as among litigants and their counsel,[32] and even implicit in decisions of this Court[33]—

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opinions implying a cause of action under Title VI. See nn. 20 and 21, *supra*. As far as those opinions indicate, the Government fully supported the private plaintiffs' position. See *Bossier Parish School Board* v. *Lemon*, 370 F. 2d 847 (CA5 1967); *Lemon* v. *Bossier Parish School Board*, 240 F. Supp. 709 (WD La. 1965).

[32] See nn. 8, 21, *supra*; n. 39, *infra*.

[33] Since 1972, the Court has twice reached the merits in suits brought by private litigants to enforce Title VI. In both cases it determined that Title VI justified at least some of the relief sought by the private litigants. *Lau* v. *Nichols*, 414 U. S. 563, 566–569; *Hills* v. *Gautreaux*, 425 U. S., at 286. Although in neither case did the Court in terms address the question of whether Title VI provides a cause of action, in both the issue had been explicitly raised by the parties at one level of the litigation or another. These cases are accordingly consistent, at least, with the widely accepted assumption that Title VI creates a private cause of action.

In *Lau*, the respondents (the defendants below) argued "that the Fourteenth Amendment and the Civil Rights Act do not give a party a federal cause of action every time a School District fails to resolve a problem—not of its making—presented to it by a student." Brief in Opposition, O. T. 1973, No. 72–6520, p. 7. On the other hand, the Federal Government and at least one other *amicus curiae* explicitly took the opposite position—that Title VI was itself sufficient to create a cause of action. Memorandum for United States as *Amicus Curiae*, O. T. 1973, No. 72–6520, p. 13, and n. 5, citing *Bossier Parish School Board* v. *Lemon*, *supra*; Brief for Puerto Rican Legal Defense & Education Fund, Inc., as *Amicus Curiae*, O. T. 1973, No. 72–6520, p. 2. But cf. Brief for National Education Assn. et al. as *Amici Curiae*, O. T. 1973, No. 72–6520, p. 5 (42 U. S. C. § 1983 provided the cause of action for the relevant breach of Title VI).

In the lengthy litigation culminating in the Court's decision in *Hills* v. *Gautreaux*, *supra*, a private litigant who claimed that public housing in Chicago was being located in a racially discriminatory fashion, had filed two separate complaints relying in part on Title VI—one against the Chicago Housing Authority (CHA) and one against the Department of Housing and Urban Development (HUD), which was the agency providing federal funds to CHA. Although the two cases proceeded separately for years, they were consolidated before they reached this Court. In the early stages of the CHA suit, the District Court, over CHA's objection, explicitly

of the assumption that both Title VI and Title IX created a private right of action for the victims of illegal discrimination and the absence of legislative action to change that assumption provide further evidence that Congress at least acquiesces in, and apparently affirms, that assumption. See n. 7, *supra*. We have no doubt that Congress intended to create Title IX remedies comparable to those available under Title VI and that it understood Title VI as authorizing an implied private cause of action for victims of the prohibited discrimination.[34]

Third, under *Cort*, a private remedy should not be implied if it would frustrate the underlying purpose of the legislative scheme. On the other hand, when that remedy is necessary or at least helpful to the accomplishment of the statutory purpose, the Court is decidedly receptive to its implication under the statute.[35]

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determined that there is a cause of action under Title VI even where § 1983 is not relied upon. *Gautreaux* v. *Chicago Housing Authority*, 265 F. Supp. 582 (ND Ill. 1967). In an unreported opinion, that court apparently also found that the Title VI complaint against HUD stated a cause of action. See *Gautreaux* v. *Romney*, 448 F. 2d, at 737–740 (on appeal from the unreported decision; cause-of-action issue not raised). The complaint in that suit, which is reprinted in the appendix filed by the parties in *Hills* v. *Gautreaux*, derives the cause of action directly from Title VI. App., O. T. 1975, No. 74–1047, p. 35. Section 1983 was not available in this suit against federal officials, and the Administrative Procedure Act was nowhere mentioned. Although by the time the consolidated cases reached this Court the primary contested issue was the propriety of the relief ordered by the District Court against HUD, the Court did note that the agency had "been judicially found to have violated the Fifth Amendment and the Civil Rights Act of 1964 . . . ." 425 U. S., at 286. The Government did not raise the cause-of-action question.

[34] "In sum, we conclude that Congress clearly understood that it was conferring power upon the courts to [grant relief] . . . under the statute." See *Dalia* v. *United States*, *ante*, at 254. Indeed, the evidence of legislative intent is so compelling that we have no hesitation in concluding that even the test now espoused by MR. JUSTICE POWELL, *post*, at 749, is satisfied in this case.

[35] See *Allen* v. *State Board of Elections*, 393 U. S., at 556; *Wyandotte*

Title IX, like its model Title VI, sought to accomplish two related, but nevertheless somewhat different, objectives. First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices. Both of these purposes were repeatedly identified in the debates on the two statutes.[36]

The first purpose is generally served by the statutory procedure for the termination of federal financial support for institutions engaged in discriminatory practices.[37] That rem-

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Transportation Co. v. *United States*, 389 U. S., at 202; *J. I. Case Co.* v. *Borak*, 377 U. S., at 432; *Machinists* v. *Central Airlines*, 372 U. S., at 690.

[36] With respect to Title VI, for example, the comments of Senator Pastore:

"[T]he purpose of title VI is to make sure that funds of the United States are not used to support racial discrimination," 110 Cong. Rec. 7062 (1964),

should be compared with the comments of Representative Lindsay:

"Everything in this proposed legislation has to do with providing a body of law which will surround and protect the individual from some power complex. This bill is designed for the protection of individuals. When an individual is wronged he can invoke the protection to himself, but if he is unable to do so because of economic distress or because of fear then the Federal Government is authorized to invoke that individual protection for that individual . . . ." *Id.*, at 1540.

With respect to Title IX, the comments of Representative Mink:

"Any college or university which has [a] . . . policy which discriminates against women applicants . . . is free to do so under [Title IX] but such institutions should not be asking the taxpayers of this country to pay for this kind of discrimination. Millions of women pay taxes into the Federal treasury and we collectively resent that these funds should be used for the support of institutions to which we are denied equal access," 117 Cong. Rec. 39252 (1971),

should be compared with the comments of Senator Bayh:

"[Title IX] is a strong and comprehensive measure which I believe is needed if we are to provide women with solid legal protection as they seek education and training for later careers . . . ." 118 Cong. Rec. 5806–5807 (1972).

[37] See § 902 of Title IX, 20 U. S. C. § 1682. There are some occasions, however, when even this purpose cannot be served unless a private remedy

edy is, however, severe and often may not provide an appropriate means of accomplishing the second purpose if merely an isolated violation has occurred.[38] In that situation, the violation might be remedied more efficiently by an order requiring an institution to accept an applicant who had been improperly excluded.[39] Moreover, in that kind of situation it makes little sense to impose on an individual, whose only interest is in obtaining a benefit for herself, or on HEW, the burden of demonstrating that an institution's practices are so pervasively discriminatory that a complete cutoff of federal funding is appropriate. The award of individual relief to a private litigant who has prosecuted her own suit is not only

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is available. For a recipient of a one-shot grant of federal money, for example, the temptation to use the fruits of that money in furtherance of a discriminatory policy adopted several years later would not be dampened by any powers given the federal donor agency under Title IX.

[38] Congress itself has noted the severity of the fund-cutoff remedy and has described it as a last resort, all else—including "lawsuits"—failing. See, *e. g.*, 110 Cong. Rec. 7067 (1964) (Sen. Ribicoff):

"Personally, I think it would be a rare case when funds would actually be cut off. In most cases alternative remedies, principally lawsuits to end discrimination, would be the preferable and more effective remedy. If a Negro child were kept out of a school receiving Federal funds, I think it would be better to get the Negro child into school than to cut off funds and impair the education of the white children."

See also *id.*, at 5090, 6544 (Sen. Humphrey); *id.*, at 7103 (Sen. Javits).

[39] This insight is not of recent vintage. In *Cumming* v. *Richmond County Board of Education*, 175 U. S. 528, several black taxpayers sued a school board that provided free high school education to white children, but not to black children. The remedy they sought under the separate-but-equal doctrine then in force under the Fourteenth Amendment, see *Plessy* v. *Ferguson*, 163 U. S. 537, was closure of the white high school rather than appropriation of funds for a black high school. Mr. Justice Harlan for the Court rejected this claim, noting that "the result would only be to take from white children . . . without giving to colored children . . . ." 175 U. S., at 544. He suggested that the result might be different if "the plaintiffs had sought to compel the Board of Education . . . to establish and maintain a high school for colored children . . . ." *Id.*, at 545.

sensible but is also fully consistent with—and in some cases even necessary to—the orderly enforcement of the statute.[40]

The Department of Health, Education, and Welfare, which is charged with the responsibility for administering Title IX, perceives no inconsistency between the private remedy and the public remedy.[41] On the contrary, the agency takes the

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[40] In the context of noting the kinship of Title VI and Title IX, Senator Bayh lauded the enforcement procedures available under the former for their "great success" and "their effectiveness and flexibility." 117 Cong. Rec. 30408 (1971); 118 Cong. Rec. 5807 (1972). As noted earlier, private suits had become an important and especially flexible part of those procedures by 1972, and were almost assuredly known to Congress. See also 117 Cong. Rec. 11339 (1971) (Sen. Mondale) (noting that attorney's fees for successful Title VI litigants under § 718 were necessary to forestall a "law enforcement crisis in the field of civil rights").

A further indication of the consistency of Title IX's purposes and the existence of a private remedy is the fact that, until the District Court and Court of Appeals decisions in this case, the federal courts had consistently recognized such a remedy under that Title and under Title VI before it. *E. g., Uzzell* v. *Friday*, 547 F. 2d 801, aff'd en banc, 558 F. 2d 727 (CA4 1977), vacated on other grounds, 438 U. S. 912; *Gilliam* v. *Omaha*, 524 F. 2d 1013 (CA8 1975); *Garrett* v. *Hamtramck*, 503 F. 2d 1236 (CA6 1974); *Serna* v. *Portales Municipal Schools*, 499 F. 2d 1147 (CA10 1974); *Otero* v. *New York City Housing Authority*, 484 F. 2d 1122, 1138 (CA2 1973); *Piascik* v. *Cleveland Museum of Art*, 426 F. Supp. 779 (ND Ohio 1976); cases cited in n. 21, *supra*. This Court has frequently accepted a history of federal-court recognition of a cause of action as indicative of the propriety of its implication. *E. g., Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S., at 730; *Machinists* v. *Central Airlines*, *supra*, at 690; *Texas & Pacific R. Co.* v. *Rigsby*, 241 U. S., at 39.

[41] It has been suggested that, at least in the absence of an exhaustion requirement, private litigation will interfere with HEW's enforcement procedures under § 902 of Title IX. The simple answer to this suggestion is that the Government itself perceives no such interference under the circumstances of this case, and argues that if the possibility of interference arises in another case, appropriate action can be taken by the relevant court at that time. See n. 8, *supra*.

In addition, Congress itself was apparently not worried about such interference when it passed Title IX. As discussed *supra*, at 699–700, the statute of which Title IX is a part also contains a provision, § 718, allow-

unequivocal position that the individual remedy will provide effective assistance to achieving the statutory purposes. See

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ing attorney's fees under Title VI. No matter how narrowly that provision is read, it certainly envisions private enforcement suits apart from the administrative procedures that Title VI, like Title IX, expressly creates. If such suits would not hamper administrative enforcement of Title VI against local and state school officials, it is hard to see how they would do so with respect to other recipients of federal funds.

True, this Court has sometimes refused to imply private rights of action where administrative or like remedies are expressly available. *E. g., National Railroad Passenger Corp.* v. *National Assn. of Railroad Passengers,* 414 U. S. 453; *T. I. M. E. Inc.* v. *United States,* 359 U. S. 464. But see *Cort* v. *Ash,* 422 U. S., at 79; *Superintendent of Insurance* v. *Banker's Life & Cas. Co.,* 404 U. S. 6; *Wyandotte Transportation Co.* v. *United States,* 389 U. S. 191; *J. I. Case Co.* v. *Borak,* 377 U. S. 426. But it has never withheld a private remedy where the statute explicitly confers a benefit on a class of persons and where it does not assure those persons the ability to activate and participate in the administrative process contemplated by the statute. See *Rosado* v. *Wyman,* 397 U. S. 397, 406 n. 8; cf. *Cort* v. *Ash, supra,* at 74–75; *Calhoon* v. *Harvey,* 379 U. S. 134. As the Government itself points out in this case, Title IX not only does not provide such a mechanism, but the complaint procedure adopted by HEW does not allow the complainant to participate in the investigation or subsequent enforcement proceedings. Moreover, even if those proceedings result in a finding of a violation, a resulting voluntary compliance agreement need not include relief for the complainant. Brief for Federal Respondents 59 n. 36. Furthermore, the agency may simply decide not to investigate—a decision that often will be based on a lack of enforcement resources, rather than on any conclusion on the merits of the complaint. See n. 42, *infra.* In that case, if no private remedy exists, the complainant is relegated to a suit under the Administrative Procedure Act to compel the agency to investigate and cut off funds. *E. g., Adams* v. *Richardson,* 156 U. S. App. D. C. 267, 480 F. 2d 1159 (1973). But surely this alternative is far more disruptive of HEW's efforts efficiently to allocate its enforcement resources under Title IX than a private suit against the recipient of federal aid could ever be.

For these same reasons, we are not persuaded that individual suits are inappropriate in advance of exhaustion of administrative remedies. Because the individual complainants cannot assure themselves that the

n. 8, *supra*. The agency's position is unquestionably correct.[42]

Fourth, the final inquiry suggested by *Cort* is whether implying a federal remedy is inappropriate because the subject matter involves an area basically of concern to the States. No such problem is raised by a prohibition against invidious discrimination of any sort, including that on the basis of sex. Since the Civil War, the Federal Government and the federal courts have been the "'*primary* and powerful reliances'" in protecting citizens against such discrimination. *Steffel* v. *Thompson*, 415 U. S. 452, 464 (emphasis in original), quoting F. Frankfurter & J. Landis, The Business of the Supreme Court 65 (1928). Moreover, it is the expenditure of federal funds

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administrative process will reach a decision on their complaints within a reasonable time, it makes little sense to require exhaustion. See 3 K. Davis, Administrative Law Treatise § 20.01, p. 57 (1958).

[42] In its submissions to this Court, as well as in other public statements, HEW has candidly admitted that it does not have the resources necessary to enforce Title IX in a substantial number of circumstances:

"As a practical matter, HEW cannot hope to police all federally funded education programs, and even if administrative enforcement were always feasible, it often might not redress individual injuries. An implied private right of action is necessary to ensure that the fundamental purpose of Title IX, the elimination of sex discrimination in federally funded education programs, is achieved." Reply Brief for Federal Respondents 6.

See also 40 Fed. Reg. 24148–24159 (1975).

In the notice of proposed rulemaking just cited, in fact, HEW proposed to employ its enforcement resources under both Title VI and Title IX *solely* to remedy "systemic discrimination rather than [to use] a reactive or complaint-oriented approach geared toward securing individual relief for persons claiming discrimination." *Id.*, at 24148. The agency explained this approach as necessary to allow it to manage its workload—a workload primarily made up of "complaints involving sex discrimination in higher education academic employment." *Ibid.* Adverse commentary on this proposal led HEW to abandon it, although the result has been a steadily increasing backlog of unprocessed complaints. Nonetheless, its explanation of the proposal supports the conclusion that HEW's enforcement capabilities under Title IX are especially limited in precisely those areas where private suits can be most effective.

that provides the justification for this particular statutory prohibition. There can be no question but that this aspect of the *Cort* analysis supports the implication of a private federal remedy.

In sum, there is no need in this case to weigh the four *Cort* factors; all of them support the same result. Not only the words and history of Title IX, but also its subject matter and underlying purposes, counsel implication of a cause of action in favor of private victims of discrimination.

II

Respondents' principal argument against implying a cause of action under Title IX is that it is unwise to subject admissions decisions of universities to judicial scrutiny at the behest of disappointed applicants on a case-by-case basis. They argue that this kind of litigation is burdensome and inevitably will have an adverse effect on the independence of members of university committees.

This argument is not original to this litigation. It was forcefully advanced in both 1964 and 1972 by the congressional opponents of Title VI and Title IX,[43] and squarely rejected by the congressional majorities that passed the two statutes. In short, respondents' principal contention is not a legal argument at all; it addresses a policy issue that Congress has already resolved.

History has borne out the judgment of Congress. Although victims of discrimination on the basis of race, religion, or national origin have had private Title VI remedies available at least since 1965, see n. 21, *supra*, respondents have not come forward with any demonstration that Title VI litigation has been so costly or voluminous that either the academic community or the courts have been unduly burdened. Nothing but speculation supports the argument that university

[43] *E. g.*, 117 Cong. Rec. 39254 (1971) (Rep. Wyman); 110 Cong. Rec. 5253 (1964) (Sen. Talmadge).

administrators will be so concerned about the risk of litigation that they will fail to discharge their important responsibilities in an independent and professional manner.[44]

III

Respondents advance two other arguments that deserve brief mention. Starting from the premise that Title IX and Title VI should receive the same construction, respondents argue (1) that a comparison of Title VI with other Titles of the Civil Rights Act of 1964 demonstrates that Congress created express private remedies whenever it found them desirable;[45] and (2) that certain excerpts from the legislative history of Title VI foreclose the implication of a private remedy.[46]

Even if these arguments were persuasive with respect to Congress' understanding in 1964 when it passed Title VI, they would not overcome the fact that in 1972 when it passed Title IX, Congress was under the impression that Title VI

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[44] Furthermore, unless respondents are arguing that Title IX (and, by implication, Title VI) is itself unconstitutional, this argument is entirely misconceived. Whatever disruption of the academic community may accompany an occasional individual suit seeking admission is dwarfed by the relief expressly contemplated by the statute—a cutoff of all federal funds. For this reason, in fact, the opponents of Title VI argued that the provision should be rejected in favor of reliance on judicial remedies available under the Fourteenth Amendment. For example, in reply to Senator Humphrey's advocacy of the administrative remedy, Senator Talmadge asked:

"Why does not the Senator rely on the court's authority [under the Fourteenth Amendment], instead of giving arbitrary, capricious, wholesale punitive power to some Federal bureaucrat to starve entire cities, towns, States, and regions at one fell swoop?" 110 Cong. Rec. 5254 (1964).

[45] See 42 U. S. C. § 2000a–3 (Title II); 42 U. S. C. §§ 2000e–5 (f)(1), (3) (Title VII).

[46] See 110 Cong. Rec. 1519 (1964) (Rep. Celler); *id.*, at 2467 (Rep. Gill); *id.*, at 6562 (Sen. Kuchel); *id.*, at 7063 (Sen. Pastore); *id.*, at 7065 (Sen. Keating); *id.*, at 8345 (Sen. Proxmire).

could be enforced by a private action and that Title IX would be similarly enforceable. See *supra*, at 696–699. "For the relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was." *Brown* v. *GSA*, 425 U. S. 820, 828. But each of respondents' arguments is, in any event, unpersuasive.

The fact that other provisions of a complex statutory scheme create express remedies has not been accepted as a sufficient reason for refusing to imply an otherwise appropriate remedy under a separate section. See, *e. g.*, *J. I. Case Co.* v. *Borak*, 377 U. S. 426; *Wyandotte Transportation Co.* v. *United States*, 389 U. S. 191. Rather, the Court has generally avoided this type of "excursion into extrapolation of legislative intent," *Cort* v. *Ash*, 422 U. S., at 83 n. 14, unless there is other, more convincing, evidence that Congress meant to exclude the remedy. See *National Railroad Passenger Corp.* v. *National Assn. of Railroad Passengers*, 414 U. S., at 458–461.

With one set of exceptions, the excerpts from the legislative history cited by respondents as contrary to implication of a private remedy under Title VI, were all concerned with a procedure for terminating federal funding.[47] None of them evidences any hostility toward an implied private remedy to terminate the offending discrimination. They are consistent with the assumption expressed frequently during the debates that such a judicial remedy—either through the kind of broad construction of state action under § 1983 adopted by the Court of Appeals for the Fourth Circuit in *Simkins* v. *Moses H. Cone Memorial Hospital*, 323 F. 2d 959 (1963),[48]

[47] As discussed earlier, that type of procedure is far more severe than individual suits, and was already the subject of express administrative provisions in Title VI.

[48] Consider the following comment by Senator Humphrey:

"The purpose of Title VI is to make sure that funds of the United States are not used to support racial discrimination. In many instances the practices of segregation or discrimination, which Title VI seeks to end, are

or through an implied remedy [49]—would be available to private litigants regardless of how the fund-cutoff issue was resolved.

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unconstitutional. This is clearly so wherever Federal funds go to a State agency which engages in racial discrimination. It may also be so where Federal funds go to support private, segregated institutions, under the decision in *Simkins* v. *Moses H. Cone Memorial Hospital*, 323 F. 2d 959 (CA4 1963), [cert. denied, 376 U. S. 938]. In all cases, such discrimination is contrary to national policy, and to the moral sense of the Nation. Thus, title VI is simply designed to insure that Federal funds are spent in accordance with the Constitution and the moral sense of the Nation." 110 Cong. Rec. 6544 (1964). See also *ibid.* (Sen. Humphrey); *id.*, at 7062 (Sen. Pastore); *id.*, at 7065 (Sen. Ribicoff); *id.*, at 12677 (Sen. Allott); *id.*, at 12719 (Sen. Javits).

Although it has been suggested that the state-action doctrine in *Simkins* is overbroad, *e. g.*, *Greco* v. *Orange Memorial Hospital Corp.*, 513 F. 2d 873 (CA5 1975), there is no denying that the Title VI Congress assumed and approved the availability of private suits against many private recipients of federal funds.

[49] Various statements made during the debates suggest an assumption that Title VI would be judicially enforceable apart from the administrative procedures contained in § 602. In addition to Senator Ribicoff's reference to "lawsuits" as the principal and preferable "alternative" to cutting off funds under the administrative remedy, n. 38, *supra*, see, for example, Senator Humphrey's statement:

"*Title VI* would have a substantial and eminently desirable impact on programs of assistance to education. Title VI would require elimination of racial discrimination and segregation in all 'impacted area' schools receiving Federal grants under Public Laws 815 and 874. Racial segregation at such schools is now prohibited by the Constitution. The Commissioner of Education would be warranted in relying on any existing plans of desegregation which appeared adequate and effective, and on *litigation by private parties* or by the Attorney General under title IV [of the 1964 Civil Rights Act], *as the primary means of securing compliance with this nondiscriminatory requirement*. It is not expected that funds would be cut off so long as reasonable steps were being taken in good faith to end unconstitutional segregation." 110 Cong. Rec. 6545 (1964) (emphasis added).

Also interesting is a debate on the Senate floor on March 13, 1964. *Id.*, at 5253–5256. Senator Talmadge began the relevant discussion by characterizing the "broad" powers delegated federal agencies under

The only excerpt relied upon by respondents that deals precisely with the question whether the victim of discrimination has a private remedy under Title VI was a comment by

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§ 602 as "barbarous." *Id.*, at 5253. When Senator Humphrey responded that the "right" against discrimination embodied in § 601 justified those broad enforcement powers, the following exchange ensued:

"Mr. TALMADGE. That right is enforceable in every court of the land, and the Senator from Minnesota knows it.

"Mr. HUMPHREY. That is correct. The existing law of the land is stated in section 601. Sections 602 and 603 . . . do not represent an extension of *that* law. . . . They represent a procedural limitation on the power of an affected *agency* to enforce existing powers." *Id.*, at 5254 (emphasis added).

At this point, the debate began to focus on an argument repeatedly made by the opponents of Title VI until it was subsequently amended. See also *id.*, at 13435–13436 (Sen. Long). Although recipients of federal aid in the form of "a contract of insurance or guaranty" were exempted from the administrative enforcement procedure in § 602, the opponents felt that the exemption should be included in the statement of rights in § 601 as well. Otherwise, they argued, the exemption would not be effective—apparently because of the possibility, mentioned by Senator Talmadge and quoted above, of judicial enforcement outside of § 602. In the midst of discussing this point, Senator Stennis asked if "section 602 is *a* method by which section 601 will be enforced," to which Senator Humphrey replied: "Yes, it is the method for those governmental *agencies* and activities covered by Title VI." 110 Cong. Rec. 5255 (1964) (emphasis added).

At this point, Senator Case entered the fray:

". . . I wish to make clear that the words and provisions of section 601 and the substantive rights established and stated in that section are not limited by the limiting words of section 602. Section 602 says that when a department or agency of the Government—and I think the Senator was correct, earlier, when he made this careful distinction—in dealing with the kinds of programs which are referred to in section 602, attempts to prevent the discrimination, or what-not, the department must follow this procedure. I agree. My only point is that I do not want my embracement of this bill to be construed as indicating that I believe that the substantive rights of an individual, as they may exist under the Constitution, or as they may be stated in section 601, are limited in any degree whatsoever." *Ibid.*

In his effort to mollify the opponents of Title VI on the issue of federal guarantees, Senator Humphrey at first appeared to disagree with Senator

Senator Keating. In it, he expressed disappointment at the administration's failure to include his suggestion for an express remedy in its final proposed bill.[50] Our analysis of the

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Case's interpretation. However, when the latter reiterated the point that § 602 "is not intended to limit the rights of individuals, if they have any way of enforcing their rights apart from the provisions of the bill, by way of suit or any other procedure," Senator Humphrey agreed—and apparently went further:

"I thoroughly agree with the Senator insofar as an *individual* is concerned. As a *citizen* of the United States, he has his full constitutional rights. He has his right to go to court and institute suit and whatever may be provided in the *law and* in the Constitution. There would be no limitation on the *individual*. The limitation would be on the qualification of Federal *agencies*." *Id.*, at 5256 (emphasis added).

Senator Keating's conclusion of this debate is discussed in n. 52, *infra*.

Two points need be made about this exchange. First, the controversy over how to treat federal guarantees was later resolved by removing the reference to those guarantees from § 602 and adding a new provision, § 605, which simply exempted them from the effect of the title. This solved the complaints of the Title's opponents, without diluting the declaration of rights in § 601. Second, although this debate may evidence some confusion over the law existing prior to the enactment of Title VI insofar as that law would not reach many of the *private* discriminators affected by § 601, but cf. n. 48, *supra*, it demonstrates a congressional assumption that whatever rights existed under the law were automatically enforceable by private litigants. The administrative provisions in §§ 602 and 603 were simply means by which additional—and far more controversial—procedures were established and then limited.

[50] "Parenthetically, while we favored the inclusion of the right to sue on the part of the agency, the State, or the facility which was deprived of Federal funds, we also favored the inclusion of a provision granting the right to sue to the person suffering from discrimination. This was not included in the bill." 110 Cong. Rec. 7065 (1964).

Although not cited by respondents, two other passages in the legislative history are of similar effect. See *id.*, at 5266 (Sen. Keating); Hearings before the Senate Committee on the Judiciary on S. 1731 and S. 1750, 88th Cong., 1st Sess., 335 (1963) (Sen. Keating).

In August 1963, the Justice Department agreed to redraft its original proposal for Title VI in light of congressional criticism. At that time, Senator Keating, along with Senator Ribicoff, submitted the following

legislative history convinces us, however, that neither the administration's decision not to incorporate that suggestion expressly in its bill, nor Senator Keating's response to that decision, is indicative of a rejection of a private right of action against recipients of federal funds. Instead, the former appears to have been a compromise aimed at protecting individual rights without subjecting the Government to suits,[51]

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suggested provision to the Department for its consideration in the redrafting process.

"(a) Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by the nondiscrimination requirement of section 601 of the Civil Rights Act of 1963, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order, may be instituted (1) *by the person aggrieved, or* (2) by the Attorney General for or in the name of the United States. In any proceeding hereunder, the United States shall be liable for costs the same as a private person.

"(b) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether the party aggrieved shall have exhausted any administrative or other remedy that may be provided by law." 109 Cong. Rec. 15375 (1963) (emphasis added).

Senator Keating explained that this section would have allowed private suits to terminate funding *or* to require "specific performance of the nondiscrimination requirement" in Title VI. *Id.*, at 15376. See generally Hearings, *supra*, at 349–352.

[51] The Keating suggestion was made in the context of broader complaints that the original version of Title VI, which is quoted in n. 14, *supra*, was too weak and too dependent on the fund-cutoff remedy. See, *e. g.*, 109 Cong. Rec. 14833–14835 (1963) (Sens. Ribicoff and Keating). That version, it should be noted, was not explicitly declarative of any individual right against discrimination. Instead, it merely allowed federal agencies to withhold funds from discriminatory recipients.

The result of the administration's reconsideration of Title VI was a compromise. Although its redraft, which in major part was enacted as Title VI, did not include an express private cause of action either to cut off funds or to end discrimination, it did rephrase § 601 as a declaration

while the latter is merely one Senator's isolated expression of a preference for an express private remedy.[52] In short, neither is inconsistent with the implication of such a remedy. Nor is there any other indication in the legislative history that any Member of Congress voted in favor of the statute in reliance on an understanding that Title VI did not include a private remedy.

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of an absolute individual right not to have federal funds spent in aid of discrimination.

There is a plausible reason for this compromise. In its final form, § 601 was far more conducive to implication of a private remedy against a discriminatory recipient than was the original language, but at the same time was arguably *less* conducive to implication of a private remedy against the Government (as well as the recipient) to compel the cutoff of funds. Although willing to extend private rights against discriminatory recipients, the Government may not have been anxious to encourage suits against itself.

In this context, it is also understandable that some Members of Congress, as noted earlier, evidenced dissatisfaction at the unavailability under Title VI of private suits to cut off funds. See remarks cited in n. 46, *supra*. Even the Keating remark relied on by respondents, n. 50, *supra*, can be understood in this light.

[52] As noted earlier, some of Senator Keating's colleagues came to the view that the absence of an express private remedy would not foreclose the implication of one under the right-declarative language in the administration's final proposal. See n. 49, *supra*. Even Senator Keating, after listening to this view expressed by Senator Case in the March 13, 1964, debate quoted *ibid.*, appeared to agree—although he still wished the remedy were express:

"I wish to associate myself with the very careful analysis made by the Senator from New Jersey and say that I agree with him thoroughly. *If the bill does not mean what he has indicated it means, it ought to be made to mean so.* I think the limitation of powers set forth in title VI is too extensive. Under section 603 a State, or political subdivision of a State, or an agency of either, which is denied funds because discrimination is taking place, is given the right of action in court. But there is no correlative right in the citizen. If funds are granted to discriminatory projects by public officials, the citizen who is denied the benefits of the project has no correlative right to bring a suit in court, and he should have." 110 Cong. Rec. 5256 (1964) (emphasis added).

IV

When Congress intends private litigants to have a cause of action to support their statutory rights, the far better course is for it to specify as much when it creates those rights. But the Court has long recognized that under certain limited circumstances the failure of Congress to do so is not inconsistent with an intent on its part to have such a remedy available to the persons benefited by its legislation. Title IX presents the atypical situation in which *all* of the circumstances that the Court has previously identified as supportive of an implied remedy are present. We therefore conclude that petitioner may maintain her lawsuit, despite the absence of any express authorization for it in the statute.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. CHIEF JUSTICE BURGER concurs in the judgment.

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE STEWART joins, concurring.

Having joined the Court's opinion in this case, my only purpose in writing separately is to make explicit what seems to me already implicit in that opinion. I think the approach of the Court, reflected in its analysis of the problem in this case and cases such as *Santa Clara Pueblo* v. *Martinez*, 436 U. S. 49 (1978), *Cort* v. *Ash*, 422 U. S. 66 (1975), and *National Railroad Passenger Corp.* v. *National Assn. of Railroad Passengers*, 414 U. S. 453 (1974), is quite different from the analysis in earlier cases such as *J. I. Case Co.* v. *Borak*, 377 U. S. 426 (1964). The question of the existence of a private right of action is basically one of statutory construction. See *ante*, at 688. And while state courts of general jurisdiction still enforcing the common law as well as statu-

tory law may be less constrained than are federal courts enforcing laws enacted by Congress, the latter must surely look to those laws to determine whether there was an intent to create a private right of action under them.

We do not write on an entirely clean slate, however, and the Court's opinion demonstrates that Congress, at least during the period of the enactment of the several Titles of the Civil Rights Act, tended to rely to a large extent on the courts to *decide* whether there should be a private right of action, rather than determining this question for itself. Cases such as *J. I. Case Co.* v. *Borak, supra,* and numerous cases from other federal courts, gave Congress good reason to think that the federal judiciary would undertake this task.

I fully agree with the Court's statement that "[w]hen Congress intends private litigants to have a cause of action to support their statutory rights, the far better course is for it to specify as much when it creates those rights." *Ante,* at 717. It seems to me that the factors to which I have here briefly adverted apprise the lawmaking branch of the Federal Government that the ball, so to speak, may well now be in its court. Not only is it "far better" for Congress to so specify when it intends private litigants to have a cause of action, but for this very reason this Court in the future should be extremely reluctant to imply a cause of action absent such specificity on the part of the Legislative Branch.

MR. JUSTICE WHITE, with whom MR. JUSTICE BLACKMUN joins, dissenting.

In avowedly seeking to provide an additional means to effectuate the broad purpose of § 901 of the Education Amendments of 1972, 20 U. S. C. § 1681, to end sex discrimination in federally funded educational programs, the Court fails to heed the concomitant legislative purpose not to create a new private remedy to implement this objective. Because in my view the legislative history and statutory scheme show that Congress intended not to provide a new private cause of action, and

because under our previous decisions such intent is controlling,[1] I dissent.

I

The Court recognizes that because Title IX was explicitly patterned after Title VI of the Civil Rights Act of 1964, 42 U. S. C. § 2000d *et seq.*, it is difficult to infer a private cause of action in the former but not in the latter. I have set out once before my reasons for concluding that a new private cause of action to enforce Title VI should not be implied, *University of California Regents* v. *Bakke*, 438 U. S. 265, 379 (1978) (separate opinion of WHITE, J.), and I find nothing in the legislative materials reviewed by the Court that convinces me to the contrary. Rather, the legislative history, like the terms of Title VI itself, makes it abundantly clear that the Act was and is a mandate to federal agencies to eliminate discrimination in federally funded programs. Although there was no intention to cut back on private remedies existing under 42 U. S. C. § 1983 to challenge discrimination occurring under color of state law, there is no basis for concluding that Congress contemplated the creation of private remedies either against private parties who previously had been subject to no constitutional or statutory obligation not to discriminate, or against federal officials or agencies involved in funding allegedly discriminatory programs.

The Court argues that because funding termination, authorized by § 602, 42 U. S. C. § 2000d–1, is a drastic remedy, Congress must have contemplated private suits in order directly and less intrusively to terminate the discrimination allegedly being practiced by the recipient institutions. But the Court's conclusion does not follow from its premise because funding termination was not contemplated as the only—or even the primary—agency action to end discrimination. Rather, Con-

[1] *Cort* v. *Ash*, 422 U. S. 66, 78 (1975); *Securities Investor Protection Corp.* v. *Barbour*, 421 U. S. 412 (1975); *National Railroad Passenger Corp.* v. *National Assn. of Railroad Passengers*, 414 U. S. 453 (1974).

gress considered termination of financial assistance to be a remedy of last resort, and expressly obligated federal agencies to take measures to terminate discrimination without resorting to termination of funding.

Title VI was enacted on the proposition that it was contrary at least to the "moral sense of the Nation" [2] to expend federal funds in a racially discriminatory manner. This proposition was not new, for every President since President Franklin Roosevelt had, by Executive Order, prohibited racial discrimination in hiring in certain federally assisted programs.[3] Further, Congress was aware that most agencies dispensing federal funds already had "authority to refuse or terminate assistance for failure to comply with a variety of requirements imposed by statute or by administrative action." [4] But Congress was plainly dissatisfied with agency efforts to ensure the nondiscriminatory use of federal funds; [5] and the predicate for

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[2] 110 Cong. Rec. 6544 (1964) (Sen. Humphrey). Senator Humphrey noted President Kennedy's message of June 19, 1963:

"'Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination.'" *Id.*, at 6543.

[3] See, *e. g.*, Exec. Order No. 8802, 3 CFR 957 (1938–1943 Comp.) (Pres. Roosevelt); Exec. Order No. 10210, 3 CFR 390 (1949–1953 Comp.) (Pres. Truman); Exec. Order No. 10479, 3 CFR 961 (1949–1953 Comp.) (Pres. Eisenhower); Exec. Order No. 10925, 3 CFR 448 (1959–1963 Comp.) (Pres. Kennedy).

[4] 110 Cong. Rec. 6546 (1964) (Sen. Humphrey).

[5] Thus, Senator Humphrey noted:

"Much has been done by the executive branch to eliminate racial discrimination from federally assisted programs. President Kennedy, by Executive order, prohibited such discrimination in federally assisted housing, and in employment on federally assisted construction. Individual agencies have taken effective action for the programs they administer." *Id.*, at 6544.

Nonetheless,

"President after President has announced that national policy is to end discrimination in Federal programs and Federal assistance. But, regrettably, there has been open violation of these policies." *Id.*, at 6543.

Title VI was the belief that "the time [had] come . . . to declare a broad principle that is right and necessary, and to make it effective for every Federal program involving financial assistance by grant, loan or contract." [6]

Far from conferring new private authority to enforce the federal policy of nondiscrimination, Title VI contemplated agency action to be the principal mechanism for achieving this end. The proponents of Title VI stressed that it did not "confer sweeping new authority, of undefined scope, to Federal departments and agencies," but instead was intended to require the exercise of existing authority to end discrimination by fund recipients, and to furnish the procedure for this purpose.[7] Thus, § 601 states the federal policy of nondiscrimination, and § 602 mandates that the agencies achieve compliance by refusing to grant or continue assistance or by "any other means authorized by law." Under § 602, cutting off funds is forbidden unless the agency determines "that compliance cannot be secured by voluntary means." As Senator Humphrey explained:

> "[Title VI] encourages Federal departments and agencies to be resourceful in finding ways of ending discrimination voluntarily without forcing a termination of funds needed for education, public health, social welfare, disaster relief,

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[6] *Id.*, at 6544. Enactment of Title VI would remove "any conceivable doubts" as to the authority of agencies to eliminate discrimination in the programs they funded and "give express legislative support to the agency's actions. . . . [S]ome federal agencies appear to have been reluctant to act in this area. Title VI will require them to act." *Ibid.* Senator Humphrey further explained that "[i]n connection with various Federal programs of aid to higher education, language institutes, research grants to colleges, and the like, Title VI would . . . authorize requirements of nondiscrimination. In a number of programs, such action has already been taken." *Id.*, at 6546.

[7] *Ibid.* Senator Humphrey noted that "existing statutory authority is, however, not surrounded by the procedural safeguards which Title VI provides." *Ibid.*

and other urgent programs. Cutoff of funds needed for such purposes should be the last step, not the first, in an effective program to end racial discrimination." 110 Cong. Rec. 6546 (1964).[8]

To be sure, Congress contemplated that there would be litigation brought to enforce Title VI. The "other means" provisions of § 602 include agency suits to enforce contractual antidiscrimination provisions and compliance with agency regulations, as well as suits brought by the Department of Justice under Title IV of the 1964 Act, where the recipient is a public entity.[9] Congress also knew that there would be private suits

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[8] See also *id.*, at 6544:

"Moreover, the purpose of Title VI is not to cut off funds, but to end racial discrimination. . . . In general, cutoff of funds would not be consistent with the objectives of the Federal assistance statute if there are available other effective means of ending discrimination. And section 602, by authorizing the agency to achieve compliance 'by any other means authorized by law' encourages agencies to find ways to end racial discrimination without refusing or terminating assistance."

[9] See *id.*, at 7066 (Sen. Ribicoff):

"[An] agency could, for example, ask the Attorney General to initiate a lawsuit under title IV, if the recipient were a school district or public college; or the agency could use any of the remedies available to it by virtue of its own 'rule, regulation, or order of general applicability.' For example, the most effective way for an agency to proceed would often be to adopt a rule that made the nondiscrimination requirement part of a contractual obligation on the part of the recipient . . . or . . . the agency would have authority to sue to enforce compliance with its own regulations."

The mention of "lawsuits," *id.*, at 7067, by Senator Ribicoff, on which the Court relies, see *ante*, at 705 n. 38, 712 n. 49, was in reference to the foregoing. As the Senator pointed out: "All of these remedies have the obvious advantage of seeking to end the discrimination, rather than to end the assistance." 110 Cong. Rec. 7066 (1964).

By regulation, see 45 CFR §§ 80.8 (a), 86.71 (1978), HEW has provided that "other means" in § 602 include referral to the Department of Justice for enforcement of rights of the United States under any statute or contractual undertaking.

to enforce § 601; but these suits were not authorized by § 601 itself but by 42 U. S. C. § 1983.[10] Every excerpt from the legislative history cited by the Court shows full awareness that private suits could redress discrimination contrary to the Constitution and Title VI, if the discrimination were imposed by public agencies; not one statement suggests contemplation of lawsuits against recipients not acting under color of state law.[11] Senator Humphrey was quite correct in asserting that the individual's "right to go to court and institute suit" for violation of the Fourteenth Amendment or § 601, see *ante*, at 712–714, n. 49, was not limited by the presence of alternative enforcement mechanisms in § 602. Section 1983 provides a private remedy for deprivations under color of state law of any rights "secured by the Constitution and laws," and nothing in Title VI suggests an intent to create an exception to this historic remedy for vindication of federal rights as against

[10] For instance, the Court quotes Senator Humphrey's statement that "litigation by private parties [would be among] the primary means of securing compliance" with § 601, *ante*, at 712 n. 49. But reference to the Senator's entire remarks shows he was contemplating suits under § 1983. The "[r]acial segregation . . . prohibited by the Constitution" and "litigation . . . under Title IV of the 1964 Civil Rights Act," 110 Cong. Rec. 6545 (1964), were limited to discrimination under color of law and did not reach discrimination by private parties. Congress was well aware of § 1983 suits against public agencies brought to enforce this prohibition. See *id.*, at 5247–5256.

[11] The Court, *ante*, at 711–712, n. 48, appears to rely on a statement by Senator Humphrey citing *Simkins* v. *Moses H. Cone Memorial Hospital*, 323 F. 2d 959 (CA4 1963), cert. denied, 376 U. S. 938 (1964), as support for the proposition that Title VI created a new private remedy. But *Simkins* was brought under 42 U. S. C. § 1983. See *University of California Regents* v. *Bakke*, 438 U. S. 265, 383–385 (1978) (separate opinion of WHITE, J.). In any event, although there is no doubt that in enacting Title VI Congress intended to proscribe private discrimination, the excerpt quoted by the Court does not suggest that Congress contemplated a private individual remedy against all discrimination thus prohibited. To the contrary, Senator Humphrey recognized the uncertain status of *Simkins* as authoritative exposition of § 1983 and the Fourteenth Amendment.

contrary state action.[12] The legislative history shows, however, that Congress did not intend to add to this already existing private remedy. Particularly, Congress did not intend to create a private remedy for discrimination practiced not under color of state law but by private parties or institutions.[13]

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[12] Indeed, 42 U. S. C. § 2000c–8, enacted as part of the 1964 Act, expressly preserves pre-existing private remedies against discrimination "in public education," which would include the remedies provided by § 1983.

Although concluding that Title IX and Title VI confer private causes of action, the Court refrains from addressing the permissible *remedies* available under such a cause of action. Thus, the Court focuses on suits requesting, as injunctive relief, that individuals allegedly discriminated against be admitted to federally assisted educational programs, but does not explicitly foreclose the possibility of a suit against either a recipient institution or a federal funding agency to require termination of funding of the allegedly discriminatory program. In at least two cases apparently brought directly under § 601, both of which are approvingly cited by the Court, the recipient of funds was enjoined from continuing the federally assisted project, and HUD was enjoined to terminate funding. *Blackshear Residents Org.* v. *Housing Authority of Austin*, 347 F. Supp. 1138, 1150 (WD Tex. 1972); *Hicks* v. *Weaver*, 302 F. Supp. 619, 628 (ED La. 1969). Such intervention by federal courts at the behest of private parties cannot be reconciled with the numerous procedural safeguards provided in § 602, see *University of California Regents* v. *Bakke*, *supra*, at 381–383 (separate opinion of WHITE, J.). The § 1983 cause of action does not encompass the remedy of funding termination, for it permits only such legal or equitable relief as is appropriate to "redress" the "deprivation" of the right. Cf. *Cumming* v. *Richmond County Board of Ed.*, 175 U. S. 528 (1899).

[13] In addition to citations in my separate opinion in *University of California Regents* v. *Bakke*, *supra*, at 385–386, and n. 4, see, *e. g.*, 110 Cong. Rec. 5256 (1964):

"Mr. CASE. [Section 602] is not intended to limit the rights of individuals, *if they have any way of enforcing their rights apart from the provisions of the bill*, by way of suit or any other procedure. The provision of the bill is not intended to cut down any rights that exist."

"Mr. HUMPHREY. I thoroughly agree with the Senator insofar as an individual is concerned. . . ."

The remainder of this colloquy is excerpted in the Court's opinion, *ante*, at 714 n. 49.

II

The Court further concludes that even if it cannot be persuasively demonstrated that Title VI created a private right of action, nonetheless this remedy should be inferred in Title IX because prior to its enactment several lower courts had entertained private suits to enforce the prohibition on racial discrimination in Title VI. Once again, however, there is confusion between the existing § 1983 right of action to remedy denial of federal rights under color of state law—which, as Congress recognized,[14] would encompass suits to enforce the nondiscrimination mandate of § 601—and the creation of a new right of action against private discrimination. In the case the Court relies upon most heavily, *Bossier Parish School Board* v. *Lemon*, 370 F. 2d 847 (CA5), cert. denied, 388 U. S. 911 (1967), the plaintiff class had alleged racial discrimination in violation of both Title VI and the Fourteenth Amendment, and, accordingly, the Attorney General was allowed to intervene under Title IV of the 1964 Act. In concluding that plaintiffs could sue to enforce § 601, the Court of Appeals expressed its view that this prohibition merely repeated "the law as laid down in hundreds of decisions, independent of the statute." 370 F. 2d, at 852. Clearly, the defendant was in violation of "the law . . . independent of the statute" only because it was a state entity, and the court was correct in concluding that § 602 did not withdraw the already existing right to sue to enforce this prohibition. However, to the extent the court based its holding on the proposition that an individual protected by a statute always has a right to enforce that statute,[15] it was in error; [16] and an

[14] See § 718 of the Education Amendments of 1972, 20 U. S. C. § 1617; *infra*, at 727.

[15] See 370 F. 2d, at 852 ("In the absence of a procedure through which the individuals protected by section 601's prohibition may assert their rights under it, violations of the law are cognizable by the courts").

[16] Prior to enactment of Title IX, two District Courts directly or indirectly relied on *Bossier* in holding that aggrieved individuals could sue

erroneous interpretation of Title VI should not be compounded through importation into Title IX under the guise of effectuating legislative intent. There is not one statement in the legislative history indicating that the Congress that enacted Title IX was aware of the *Bossier* litigation, much less that it adopted the particular theory relied on to uphold plaintiffs' standing in that case.[17]

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to enforce § 601, but in both of these cases the defendant was acting under color of state law. *Gautreaux* v. *Chicago Housing Authority*, 265 F. Supp. 582, 583–584 (ND Ill. 1967), followed what it believed to be the holding of *Bossier* that individuals had "standing" to enforce § 601 even though the Seventh Circuit in *Green Street Assn.* v. *Daley*, 373 F. 2d 1, 8–9, cert. denied, 387 U. S. 932 (1967), had previously declined to express its agreement with this aspect of *Bossier*. *Blackshear Residents Org.* v. *Housing Authority of Austin*, *supra*, at 1140, in turn relied on *Gautreaux*. Subsequent decisions in the *Gautreaux* v. *Chicago Housing Authority* litigation expressly noted that plaintiffs sought relief under § 1983 in every count of their complaint, see 296 F. Supp. 907, 908 (ND Ill. 1969), and 436 F. 2d 306, 307 (CA7 1970) (aff'g 296 F. Supp. 907), cert. denied, 402 U. S. 922 (1971). The one case cited by the Court that was a suit against a private organization did not mention the cause-of-action issue. *Hawthorne* v. *Kenbridge Recreation Assn., Inc.*, 341 F. Supp. 1382 (ED Va. 1972).

[17] In addition to *Bossier*, the cases discussed in n. 16, *supra*, and cases explicitly holding that the cause of action was provided by § 1983, see the Court's opinion, *ante*, at 696–697, n. 21, the Court relies on cases involving suits against federal officials. Contrary to the Court's assertion, see *ibid.*, none of these cases held that there is a direct cause of action to enforce § 601. In *Shannon* v. *Department of Housing and Urban Development*, 436 F. 2d 809, 818–819, 820 (CA3 1970), the court concluded that allegations of failure to act with respect to specific instances of discrimination were reviewable under the Administrative Procedure Act, 5 U. S. C. § 551 *et seq.* Similarly, *Southern Christian Leadership Conference, Inc.* v. *Connolly*, 331 F. Supp. 940, 943 (ED Mich. 1971), cited *ante*, at 696 n. 20, 697 n. 21, explicitly held that standing was based on § 10 of the Administrative Procedure Act, 5 U. S. C. § 702, and cited *Bossier* only in a discussion of exhaustion of administrative remedies. Neither *Gautreaux* v. *Romney*, 448 F. 2d 731 (CA7 1971), later appeal, *Gautreaux* v. *Chicago Housing Authority*, 503 F. 2d 930 (CA7 1974), aff'd *sub nom. Hills* v. *Gautreaux*, 425 U. S. 284 (1976), nor *Hicks* v. *Weaver*, 302 F. Supp. 619

The Court's reliance on § 718 of the 1972 Act, 20 U. S. C. § 1617, is likewise misplaced. That provision authorizes attorney's fees to the prevailing party other than the United States upon the entry of a final order by a federal court "against a local educational agency, a State (or any agency thereof), or the United States (or any agency thereof), for failure to comply with any provision of this chapter"—which deals with emergency school aid, 20 U. S. C. §§ 1601–1619—"or for discrimination on the basis of race, color, or national origin in violation of Title VI of the Civil Rights Act of 1964, or the fourteenth amendment to the Constitution of the United States as they pertain to elementary and secondary education." Based on this provision, it is argued that Title VI itself must have authorized private actions. However, whatever may be the value of the opinion of Congress in 1972 as to the meaning of the 1964 Civil Rights Act, the attorney's fees provision—far from intimating the existence of a remedy against private discrimination—refers only to suits against public institutions. Insofar as the provision refers to "discrimination . . . in violation of Title VI," one must strain to conclude that this was meant to encompass private suits against federal agencies whose mandate under Title VI was to enforce § 601's nondiscrimination provision applicable to all recipients of federal funds. Rather, in referring to Title VI and the Fourteenth Amendment, § 718 did no more than provide for fees in § 1983 suits brought to end discrimination under color of state law.[18]

(ED La. 1969), contains any discussion of the cause-of-action issue or even suggests that the question of the appropriate standard for reviewing such federal funding decisions had been raised.

[18] There is no basis for the Court's suggestion that at the time § 718 was enacted § 1983 was not available for suits against state or local educational agencies, see *ante*, at 700 n. 27. As described last Term in *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658, 663 nn. 5, 6 (1978), we had never indicated that suits such as *Brown* v. *Board of Education*, 347 U. S. 483 (1954), or *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1 (1971), might not be appropriate despite the holding in *Monroe* v. *Pape*, 365 U. S. 167 (1961), that local governments were not

III

The legislative intent not to create a new private remedy for enforcement of Title VI or Title IX cannot be ignored simply because in other cases involving analogous language the Court has recognized private remedies. The recent cases inferring a private right of action to enforce various civil rights statutes relied not merely upon the statutory language granting the right sought to be enforced, but also upon the clear compatibility, despite the absence of an explicit legislative mandate, between private enforcement and the legislative purpose demonstrated in the statute itself. Having concluded that 42 U. S. C. § 1982 prohibited private as well as public racial discrimination in the sale or lease of property, the Court had little choice but to hold that aggrieved individuals could enforce this prohibition, for there existed no other remedy to redress such violations of the statute.[19] The Court's reliance on *Allen* v. *State Board of Elections*, 393 U. S. 544 (1969), is equally unwarranted. The cause of action there recognized—for declaratory relief that a voting change is subject to the authorization requirements of § 5 of the Voting Rights Act of 1965, 42 U. S. C. § 1973c—served to trigger the enforcement mechanism provided in the statute itself. The Court pointedly declined to infer a private cause of action to enforce the suspension requirement of § 4 of the Act, 393 U. S., at 552–

"persons" within the meaning of § 1983. It was not until 1973, after passage of both Title IX and § 718, that the principle of municipal immunity established in *Monroe* was extended to suits for injunctive relief. See *Kenosha* v. *Bruno*, 412 U. S. 507 (1973). Even as the Court unpersuasively suggests that Congress might not have thought that private suits to remedy segregation in violation of the Fourteenth Amendment were available in 1972, it notes the furor in Congress at this time over busing as a desegregation remedy, see *ante*, at 701 n. 29.

[19] See *Sullivan* v. *Little Hunting Park*, 396 U. S. 229 (1969); *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409 (1968). Cf. *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S. 454, 459–460 (1975) (implied cause of action under 42 U. S. C. § 1981).

554; nor may those allegedly discriminated against bring suit to test voting changes in covered units against the substantive standard of § 5, either directly or through judicial review of the Attorney General's preclearance decision, *Morris* v. *Gressette*, 432 U. S. 491 (1977). The cause of action granted today is of a very different nature. It does not trigger the enforcement scheme provided in §§ 902 and 903, 20 U. S. C. §§ 1682, 1683, but entirely displaces that scheme in favor of a different approach.[20]

Congress decided in Title IX, as it had in Title VI, to prohibit certain forms of discrimination by recipients of federal funds. Where those recipients were acting under color of state law, individuals could obtain redress in the federal courts for violation of these prohibitions. But, excepting post-Civil War enactments dealing with racial discrimination in specified situations, these forms of discrimination by private entities had not previously been subject to individual redress under federal law, and Congress decided to reach such discrimination not by creating a new remedy for individuals, but by relying on the authority of the Federal Government to enforce the terms under which federal assistance would be provided.

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[20] At the time *Allen* was decided, the Department of Justice in enforcing the Voting Rights Act had not provided any formal means by which an individual could initiate review by the Department of a change affecting voting in an area covered by § 5. Since 1971, the Department has officially urged private parties to inform it of voting law changes in covered areas. 28 CFR §§ 51.12–51.15 (1978); 36 Fed. Reg. 18186 (1971). The Department of Health, Education, and Welfare has provided by regulation that any person may file a written complaint alleging discrimination in violation of Titles VI or IX within 180 days of the occurrence of the discrimination, and that after investigation HEW shall seek compliance, formally or informally, or shall inform the complainant in writing that further agency action is unwarranted. 45 CFR §§ 80.7 (b), (c), 86.71 (1978). The federal respondents have represented to the Court that they would, "of course, fulfill their responsibility under applicable regulations to conduct an administrative investigation of petitioner's charges" should this Court affirm the decision below. Brief for Federal Respondents 54 n. 33.

Whatever may be the wisdom of this approach to the problem of private discrimination, it was Congress' choice, not to be overridden by this Court.

MR. JUSTICE POWELL, dissenting.

I agree with MR. JUSTICE WHITE that even under the standards articulated in our prior decisions, it is clear that no private action should be implied here. It is evident from the legislative history reviewed in his dissenting opinion that Congress did not intend to create a private action through Title IX of the Education Amendments of 1972. It also is clear that Congress deemed the administrative enforcement mechanism it did create fully adequate to protect Title IX rights. But as mounting evidence from the courts below suggests, and the decision of the Court today demonstrates, the mode of analysis we have applied in the recent past cannot be squared with the doctrine of the separation of powers. The time has come to reappraise our standards for the judicial implication of private causes of action.[1]

Under Art. III, Congress alone has the responsibility for determining the jurisdiction of the lower federal courts. As the Legislative Branch, Congress also should determine when private parties are to be given causes of action under legislation it adopts. As countless statutes demonstrate, including Titles of the Civil Rights Act of 1964,[2] Congress recognizes that the creation of private actions is a legislative function and frequently exercises it. When Congress chooses not to provide a private civil remedy, federal courts should

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[1] The phrase "private cause of action" may not have a completely clear meaning. As the term is used herein, I refer to the right of a private party to seek judicial relief from injuries caused by another's violation of a legal requirement. In the context of legislation enacted by Congress, the legal requirement involved is a statutory duty.

[2] See 42 U. S. C. § 2000a–3 (Title II; limited to preventive relief); §§ 2000e–5 (f), (g) (Title VII; administrative preclearance required).

not assume the legislative role of creating such a remedy and thereby enlarge their jurisdiction.

The facts of this case illustrate the undesirability of this assumption by the Judicial Branch of the legislative function. Whether every disappointed applicant for admission to a college or university receiving federal funds has the right to a civil-court remedy under Title IX is likely to be a matter of interest to many of the thousands of rejected applicants. It certainly is a question of vast importance to the entire higher educational community of this country. But quite apart from the interests of the persons and institutions affected, respect for our constitutional system dictates that the issue should have been resolved by the elected representatives in Congress after public hearings, debate, and legislative decision. It is not a question properly to be decided by relatively uninformed federal judges who are isolated from the political process.

In recent history, the Court has tended to stray from the Art. III and separation-of-powers principle of limited jurisdiction. This, I believe, is evident from a review of the more or less haphazard line of cases that led to our decision in *Cort* v. *Ash*, 422 U. S. 66 (1975). The "four factor" analysis of that case is an open invitation to federal courts to legislate causes of action not authorized by Congress. It is an analysis not faithful to constitutional principles and should be rejected. Absent the most compelling evidence of affirmative congressional intent, a federal court should not infer a private cause of action.

I

The implying of a private action from a federal regulatory statute has been an exceptional occurrence in the past history of this Court. A review of those few decisions where such a step has been taken reveals in almost every case special historical circumstances that explain the result, if not the Court's analysis. These decisions suggest that the doctrine of

implication applied by the Court today not only represents judicial assumption of the legislative function, but also lacks a principled precedential basis.

A

The origin of implied private causes of actions in the federal courts is said to date back to *Texas & Pacific R. Co.* v. *Rigsby*, 241 U. S. 33 (1916). A close look at the facts of that case and the contemporary state of the law indicates, however, that *Rigsby*'s reference to the "inference of a private right of action," *id.*, at 40, carried a far different connotation than the isolated passage quoted by the Court, *ante*, at 689 n. 10, might suggest. The narrow question presented for decision was whether the standards of care defined by the Federal Safety Appliance Act's penal provisions applied to a tort action brought against an interstate railroad by an employee not engaged in interstate commerce at the time of his injury. The jurisdiction of the federal courts was not in dispute, the action having been removed from state court on the ground that the defendant was a federal corporation. See *Moore* v. *Chesapeake & O. R. Co.*, 291 U. S. 205, 215 n. 6 (1934). Under the regime of *Swift* v. *Tyson*, 16 Pet. 1 (1842), then in force, the Court was free to create the substantive standards of liability applicable to a common-law negligence claim brought in federal court. The practice of judicial reference to legislatively determined standards of care was a common expedient to establish the existence of negligence. See Thayer, Public Wrong and Private Action, 27 Harv. L. Rev. 317 (1914). *Rigsby* did nothing more than follow this practice, and cannot be taken as authority for the judicial creation of a cause of action not legislated by Congress. *Moore* v. *Chesapeake & O. R. Co.*, *supra*, at 215–216; *Jacobson* v. *New York, N. H. & H. R. Co.*, 206 F. 2d 153, 157–158 (CA1 1953) (Magruder, C. J.), aff'd *per curiam*, 347 U. S. 909 (1954).

For almost 50 years after *Rigsby*, this Court recognized an implied private cause of action in only one other statutory context.[3] Four decisions held that various provisions of the Railway Labor Act of 1926 could be enforced in a federal court. The case for implication of judicial remedies was especially strong with respect to this Act, as Congress had repealed its predecessor, Title III of the Transportation Act of 1920, after *Pennsylvania R. Co.* v. *Railroad Labor Board*, 261 U. S. 72 (1923), and *Pennsylvania Federation* v. *Pennsylvania R. Co.*, 267 U. S. 203 (1925), had held that judicial enforcement of its terms was not available. Convinced that Congress had meant to accomplish more through the 1926 Act, and faced with the absence of an express administrative or judicial enforcement mechanism, the Court in *Texas & N. O. R. Co.* v. *Railway Clerks*, 281 U. S. 548 (1930), upheld an injunction enforcing the Act's prohibition of employer interference in employees' organizational activities. Buttressed by 1934 amendments to the Act that indicated congressional approval of this step, the Court in *Virginian R.*

[3] During this period, the Court did uphold the implication of civil remedies in favor of the Government, see *Wyandotte Transportation Co.* v. *United States*, 389 U. S. 191 (1967); *United States* v. *Republic Steel Corp.*, 362 U. S. 482 (1960), and strongly suggested that private actions could be implied directly from particular provisions of the Constitution, *Bell* v. *Hood*, 327 U. S. 678, 684 (1946). See also *Jacobs* v. *United States*, 290 U. S. 13 (1933). Both of these issues are significantly different from the implication of a private remedy from a federal statute. In *Wyandotte* and *Republic Steel*, the Government already had a "cause of action" in the form of its power to bring criminal proceedings under the pertinent statutes. Thus, the Court was confronted only with the question whether the Government could exact less drastic civil penalties as an alternative means of enforcing the same obligations. And this Court's traditional responsibility to safeguard constitutionally protected rights, as well as the freer hand we necessarily have in the interpretation of the Constitution, permits greater judicial creativity with respect to implied constitutional causes of action. Moreover, the implication of remedies to enforce constitutional provisions does not interfere with the legislative process in the way that the implication of remedies from statutes can. See Part III, *infra*.

Co. v. *Railway Employees,* 300 U. S. 515 (1937), extended judicial enforcement to the Act's requirement that an employer bargain with its employees' authorized representative. Finally, in *Steele* v. *Louisville & N. R. Co.,* 323 U. S. 192 (1944), and *Tunstall* v. *Locomotive Firemen & Enginemen,* 323 U. S. 210 (1944), the Court further held that the duty of a union not to discriminate among its members also could be enforced through the federal courts.[4] In each of these cases enforcement of the Act's various requirements could have been restricted to actions brought by the Board of Mediation (later the Mediation Board), rather than by private parties. But whatever the scope of the judicial remedy, the implication of some kind of remedial mechanism was necessary to provide the enforcement authority Congress clearly intended.[5]

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[4] The Act did not refer expressly to an obligation not to discriminate, but in light of its structure, especially its vesting in an authorized union the power to exclude all others from representing employees, the Court felt compelled to imply this duty. This construction of the Act was necessary to avoid a difficult constitutional question, namely, the applicability of the Constitution's prohibition of racial discrimination to a private party enjoying a statutorily created status as an exclusive bargaining agent. See *Steele* v. *Louisville & N. R. Co.,* 323 U. S., at 202–203; *id.,* at 208–209 (Murphy, J., concurring).

[5] The Court states that a private cause of action also was implied in *Machinists* v. *Central Airlines,* 372 U. S. 682 (1963), a case involving an amendment of the Railway Labor Act applicable to airlines. *Ante,* at 692–693, n. 13. A careful reading of that case suggests that it presented a somewhat different question. Under § 204 of the 1936 amendments to the Act, boards of adjustment were established to resolve labor grievances. The Court held that a claim based on a collective-bargaining agreement that had been interpreted by such a board presented a federal question under 28 U. S. C. § 1331. The cause of action came directly from the agreement, not from any provision of the Act, and the only issue was whether this already existing private cause of action could be brought in a federal court. See Mishkin, The Federal "Question" in the District Courts, 53 Colum. L. Rev. 157, 166 (1953). Cf. *Smith* v. *Kansas City Title & Trust Co.,* 255 U. S. 180 (1921). Although as a practical matter this result entails many of the same problems involved in the implication

During this same period, the Court frequently turned back private plaintiffs seeking to imply causes of action from federal statutes. See, *e. g., Wheeldin* v. *Wheeler,* 373 U. S. 647 (1963); *T. I. M. E. Inc.* v. *United States,* 359 U. S. 464 (1959); *General Committee* v. *Southern Pacific Co.,* 320 U. S. 338 (1943); *General Committee* v. *Missouri–K.–T. R. Co.,* 320 U. S. 323 (1943); *Switchmen* v. *National Mediation Board,* 320 U. S. 297 (1943). Throughout these cases, the focus of the Court's inquiry generally was on the availability of means other than a private action to enforce the statutory duty at issue. Even in cases where the statute might be said to have been enacted for the benefit of a special class comprising the plaintiff, the factor to which the Court today attaches so much importance, *ante,* at 689–693, and n. 13, the Court refused to create a private action if Congress had provided some other means of enforcing such duties. See, *e. g., Switchmen* v. *National Mediation Board, supra,* at 300–301.

A break in this pattern occurred in *J. I. Case Co.* v. *Borak,* 377 U. S. 426 (1964). There the Court held that a private party could maintain a cause of action under § 14 (a) of the Securities Exchange Act of 1934, in spite of Congress' express creation of an administrative mechanism for enforcing that statute. I find this decision both unprecedented [6] and

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of a private cause of action, see n. 17, *infra,* at least analytically the problems are quite different.

[6] None of the authorities cited in the opinion supports the result. *Sola Electric Co.* v. *Jefferson Electric Co.,* 317 U. S. 173 (1942), and *Deitrick* v. *Greaney,* 309 U. S. 190 (1940), held that federal law could limit a state-law defense to a state-law cause of action. *Deckert* v. *Independence Shares Corp.,* 311 U. S. 282 (1940), held that a federal judge could devise equitable remedies to supplement an expressly created private action for damages. Similarly, *Mitchell* v. *Robert DeMario Jewelry, Inc.,* 361 U. S. 288 (1960); *Schine Chain Theatres, Inc.* v. *United States,* 334 U. S. 110 (1948); and *Porter* v. *Warner Holding Co.,* 328 U. S. 395 (1946), upheld various equitable remedies devised under an express equitable cause of action. As already noted, *Bell.* v. *Hood* involved the implication of a private action from a constitutional provision, and *Tunstall* v. *Locomotive*

incomprehensible as a matter of public policy. The decision's rationale, which lies ultimately in the judgment that "[p]rivate enforcement of the proxy rules provides a necessary supplement to Commission action," 377 U. S., at 432, ignores the fact that Congress, in determining the degree of regulation to be imposed on companies covered by the Securities Exchange Act, already had decided that private enforcement was unnecessary. More significant for present purposes, however, is the fact that *Borak*, rather than signaling the start of a trend in this Court, constitutes a singular and, I believe, aberrant interpretation of a federal regulatory statute.

Since *Borak*, this Court has upheld the implication of private causes of actions derived from federal statutes in only three extremely limited sets of circumstances. First, the Court in *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409 (1968); *Sullivan* v. *Little Hunting Park, Inc.*, 396 U. S. 229 (1969); and *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S. 454 (1975), recognized the right of private parties to seek relief for violations of 42 U. S. C. §§ 1981 and 1982. But to say these cases "implied" rights of action is somewhat misleading, as Congress at the time these statutes were enacted expressly referred to private enforcement actions.[7] Furthermore, as in

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Firemen & Enginemen, 323 U. S. 210 (1944), was grounded on a statute that provided no express means of enforcement. None of these cases condoned the implication of a private action in circumstances where alternative means of enforcement were available. Although I do not suggest that we should consider overruling *Borak* at this late date, cf. *Flood* v. *Kuhn*, 407 U. S. 258 (1972), the lack of precedential support for this decision militates strongly against its extension beyond the facts of the case. Cf. *Santa Fe Industries* v. *Green*, 430 U. S. 462, 477 (1977); *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 737 (1975).

[7] Both § 1981 and § 1982 are derived from § 1 of the Civil Rights Act of 1866, which was re-enacted in pertinent part in §§ 16 and 18 of the Civil Rights Act of 1870. Section 3 of the 1866 Act provided:

"[T]he district courts of the United States . . . shall have . . . cognizance . . . of all causes, civil and criminal, affecting persons who are denied . . . any of the rights secured to them by the first section of this

the Railway Labor Act cases, Congress had provided no alternative means of asserting these rights. Thus, the Court was presented with the choice between regarding these statutes as precatory or recognizing some kind of judicial proceeding.

Second, the Court in *Allen* v. *State Board of Elections*, 393 U. S. 544 (1969), permitted private litigants to sue to enforce the preclearance provisions of § 5 of the Voting Rights Act of 1965. As the Court seems to concede, this decision was reached without substantial analysis, *ante*, at 690, and n. 12, and in my view can be explained only in terms of this Court's special and traditional concern for safeguarding the electoral process.[8] In addition, as MR. JUSTICE WHITE notes, the

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act . . . . The jurisdiction in civil and criminal matters hereby conferred on the district and circuit courts of the United States shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offences against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of the cause . . . is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern said courts in the trial and disposition of such cause . . . ." 14 Stat. 27.

Section 18 of the 1870 Act made this section applicable to § 16 of the later Act. Subsequently Congress, through § 1 of the Civil Rights Act of 1871, indicated in even more explicit terms that private actions would be available to prevent official interference with the rights guaranteed by § 1 of the 1866 Act. See *Chapman* v. *Houston Welfare Rights Org.*, *ante*, at 627–628 (POWELL, J., concurring). Although one might conclude, in light of the 1871 Act, that the 1866 and 1870 Acts did not provide for private actions but merely permitted federal courts to entertain state-law actions affecting the denial of civil rights, an equally plausible reading of those statutes is that Congress created a federal cause of action to enforce § 1 of the 1866 Act.

[8] See, *e. g.*, *Williams* v. *Rhodes*, 393 U. S. 23 (1968); *Reynolds* v. *Sims*, 377 U. S. 533 (1964); *Baker* v. *Carr*, 369 U. S. 186 (1962); Wilkinson, The Supreme Court, The Equal Protection Clause, and the Three Faces of Constitutional Equality, 61 Va. L. Rev. 945, 956–976 (1975). Cf. *United*

remedy implied was very limited, thereby reducing the chances that States would be exposed to frivolous or harassing suits.[9]

Finally, the Court in *Superintendent of Insurance* v. *Bankers Life & Cas. Co.*, 404 U. S. 6 (1971), ratified 25 years of lower-court precedent that had held a private cause of action available under the Securities and Exchange Commission's Rule 10b–5. As the Court concedes, *ante*, at 692 n. 13, this decision reflects the unique history of Rule 10b–5, and did not articulate any standards of general applicability.

These few cases applying *Borak* must be contrasted with the subsequent decisions where the Court refused to imply private actions. In *Calhoon* v. *Harvey*, 379 U. S. 134 (1964), the Court refused to permit private suits in derogation of administrative remedies to enforce Title IV of the Labor-Management Reporting and Disclosure Act of 1959, in spite of that statute's command, *inter alia*, that "every member in good standing . . . shall have the right to vote for or otherwise support the candidate or candidates of his choice . . . ." 29 U. S. C. § 481 (e).[10] In *National Railroad Passenger Corp.* v. *National Assn. of Railroad Passengers*, 414 U. S. 453 (1974), the Court reversed a lower court's implication of a private action to challenge violations of the Rail Passenger Service Act of 1970, in light of the Attorney General's express enforcement authority. And in *Securities Investor Protection Corp.* v. *Barbour*, 421 U. S. 412 (1975), we refused to allow private actions under the Securities Investor Protection Act

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States v. *Carolene Products Co.*, 304 U. S. 144, 152–153 n. 4 (1938) (Stone, J., concurring). See also *United States* v. *Richardson*, 418 U. S. 166, 195 n. 17 (1974) (POWELL, J., concurring).

[9] See *ante*, at 728–729.

[10] Section 402 of the Act created an administrative procedure for investigating violations of Title IV and permitted the Secretary of Labor to sue in federal court to obtain relief. Section 403 of the Act stated that the administrative remedy was the exclusive means of challenging "an election already conducted" but did not limit attempts to obtain prospective relief, the object of the suit in *Calhoon*.

of 1970, which also was enforceable by administrative proceedings and Government suits.[11]

B

It was against this background of almost invariable refusal to imply private actions, absent a complete failure of alternative enforcement mechanisms and a clear expression of legislative intent to create such a remedy, that *Cort* v. *Ash*, 422 U. S. 66 (1975), was decided. In holding that no private action could be brought to enforce 18 U. S. C. § 610 (1970 ed. and Supp. III), a criminal statute, the Court referred to four factors said to be relevant to determining generally whether private actions could be implied. 422 U. S., at 78.[12] As MR.

[11] Since *Borak*, the Court also has entertained several cases involving challenges to various state welfare programs based in part on the Social Security Act. See, *e. g.*, *Rosado* v. *Wyman*, 397 U. S. 397 (1970); *King* v. *Smith*, 392 U. S. 309 (1968). Most of these decisions did not confront the cause-of-action issue at all; none of them addressed the question whether a private cause of action could be implied. In some instances there were conclusory, and in my view incorrect, statements to the effect that 42 U. S. C. § 1983 might provide a basis for asserting these claims. See *Chapman* v. *Houston Welfare Rights Org.*, *ante*, at 644–646. (POWELL, J., concurring.) The silence of these decisions with respect to inferring a private cause of action cannot be taken as authority for the implication of one.

[12] The Court stated its analysis as follows:

"First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted,' *Texas & Pacific R. Co.* v. *Rigsby*, 241 U. S. 33, 39 (1916) (emphasis supplied)—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? See, *e. g.*, *National Railroad Passenger Corp.* v. *National Assn. of Railroad Passengers*, 414 U. S. 453, 458, 460 (1974) (*Amtrak*). Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? See, *e. g.*, *Amtrak*, *supra*; *Securities Investor Protection Corp.* v. *Barbour*, 421 U. S. 412, 423 (1975); *Calhoon* v. *Harvey*, 379 U. S. 134 (1964). And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action

JUSTICE WHITE suggests, *ante*, at 718–719, and n. 1, these factors were meant only as guideposts for answering a single question, namely, whether Congress intended to provide a private cause of action. The conclusion in that particular case was obvious. But, as the opinion of the Court today demonstrates, the *Cort* analysis too easily may be used to deflect inquiry away from the intent of Congress, and to permit a court instead to substitute its own views as to the desirability of private enforcement.

Of the four factors mentioned in *Cort*, only one refers expressly to legislative intent. The other three invite independent judicial lawmaking. Asking whether a statute creates a right in favor of a private party, for example, begs the question at issue. What is involved is not the mere existence of a legal right, but a particular person's right to invoke the power of the courts to enforce that right.[13] See n. 1, *supra*. Determining whether a private action would be consistent with the "underlying purposes" of a legislative scheme permits a court to decide for itself what the goals of a scheme should be, and how those goals should be advanced. See Note, 43 Ford. L. Rev. 441, 454–455, 458 (1974). Finally, looking to state law for parallels to the federal right simply focuses inquiry on a particular policy consideration that Congress already may have weighed in deciding not to create a private action.

That the *Cort* analysis too readily permits courts to over-

based solely on federal law? See *Wheeldin* v. *Wheeler*, 373 U. S. 647, 652 (1963); cf. *J. I. Case Co.* v. *Borak*, 377 U. S. 426, 434 (1964); *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U. S. 388, 394–395 (1971); *id.*, at 400 (Harlan, J., concurring in judgment)." 422 U. S., at 78.

[13] The Court attempts to avoid the question-begging nature of this inquiry by emphasizing the precise phrasing of the statute at issue. *Ante*, at 689–693, and n. 13. Aside from its failure to contend with relevant decisions that do not conform to the perceived pattern, see, *e. g.*, *Calhoon* v. *Harvey*, 379 U. S. 134 (1964); *Switchmen* v. *National Mediation Board*, 320 U. S. 297 (1943), the Court's approach gives undue significance to essentially stylistic differences in legislative draftsmanship.

ride the decision of Congress not to create a private action is demonstrated conclusively by the flood of lower-court decisions applying it. Although from the time *Cort* was decided until today this Court consistently has turned back attempts to create private actions, see *Chrysler Corp.* v. *Brown, ante,* p. 281; *Santa Clara Pueblo* v. *Martinez,* 436 U. S. 49 (1978); *Piper* v. *Chris-Craft Industries,* 430 U. S. 1 (1977), other federal courts have tended to proceed in exactly the opposite direction. In the four years since we decided *Cort,* no less than 20 decisions by the Courts of Appeals have implied private actions from federal statutes. *Local 714, Amalgamated Transit Union* v. *Greater Portland Transit Dist.,* 589 F. 2d 1 (CA1 1978) (§ 13 (c) of Urban Mass Transportation Act of 1964); *Bratton* v. *Shiffrin,* 585 F. 2d 223 (CA7 1978) (§ 1007 (a) of Federal Aviation Act of 1958), cert. pending, No. 78–1398; *Redington* v. *Touche Ross & Co.,* 592 F. 2d 617 (CA2) (§ 17 (a) of Securities Exchange Act of 1934), cert. granted, 439 U. S. 979 (1978); *Lodge 1858, AFGE* v. *Webb,* 188 U. S. App. D. C. 233, 580 F. 2d 496 (§ 203 of National Aeronautics and Space Act of 1958), cert. denied *sub nom. Government Employees* v. *Frosch,* 439 U. S. 927 (1978); *Riggle* v. *California,* 577 F. 2d 579 (CA9 1978) (Rivers and Harbors Appropriation Act); *Lewis* v. *Transamerica Corp.,* 575 F. 2d 237 (CA9) (§ 206 of Investment Advisers Act of 1940), cert. granted, 439 U. S. 952 (1978); *Davis* v. *Southeastern Community College,* 574 F. 2d 1158 (CA4 1978) (§ 504 of Rehabilitation Act of 1973), cert. granted, 439 U. S. 1065 (1979); *Benjamins* v. *British European Airways,* 572 F. 2d 913 (CA2 1978) (Art. 28 (1) of Warsaw Convention), cert. denied, 439 U. S. 1114 (1979); *Abrahamson* v. *Fleschner,* 568 F. 2d 862 (CA2 1977) (§ 206 of Investment Advisers Act of 1940), cert. denied, 436 U. S. 913 (1978); *Association of Data Processing Service Orgs.* v. *Federal Home Loan Bank Board,* 568 F. 2d 478 (CA6 1977) (§ 11 (e) of Federal Home Loan Bank Act); *Wilson* v. *First Houston Investment Corp.,* 566 F. 2d 1235 (CA5 1978) (§ 206 of Invest-

ment Advisers Act of 1940), cert. pending, No. 77–1717; *New York Stock Exchange, Inc.* v. *Bloom,* 183 U. S. App. D. C. 217, 562 F. 2d 736 (1977) (§§ 16 and 21 of Glass-Steagall Act), cert. denied, 435 U. S. 942 (1978); *Daniel* v. *International Brotherhood of Teamsters,* 561 F. 2d 1223 (CA7 1977) (§ 17 (a) of Securities Act of 1933), rev'd on other grounds, 439 U. S. 551 (1979); *United Handicapped Federation* v. *Andre,* 558 F. 2d 413 (CA8 1977) (§ 504 of Rehabilitation Act of 1973); *Nedd* v. *United Mine Workers,* 556 F. 2d 190 (CA3 1977) (§ 302 of Labor Management Relations Act, 1947), cert. denied, 434 U. S. 1013 (1978); *Kipperman* v. *Academy Life Ins. Co.,* 554 F. 2d 377 (CA9 1977) (39 U. S. C. § 3009); *Kampmeier* v. *Nyquist,* 553 F. 2d 296 (CA2 1977) (§ 504 of Rehabilitation Act of 1973); *Lloyd* v. *Regional Transportation Authority,* 548 F. 2d 1277 (CA7 1977) (same); *McDaniel* v. *University of Chicago and Argonne,* 548 F. 2d 689 (CA7 1977) (§ 1 of Davis-Bacon Act), cert. denied, 434 U. S. 1033 (1978); *Hughes* v. *Dempsey-Tegeler & Co.,* 534 F. 2d 156 (CA9) (§ 6 of Securities Exchange Act of 1934), cert. denied, 429 U. S. 896 (1976). It defies reason to believe that in each of these statutes Congress absentmindedly forgot to mention an intended private action. Indeed, the accelerating trend evidenced by these decisions attests to the need to re-examine the *Cort* analysis.

II

In my view, the implication doctrine articulated in *Cort* and applied by the Court today engenders incomparably greater problems than the possibility of occasionally failing to divine an unexpressed congressional intent. If only a matter of statutory construction were involved, our obligation might be to develop more refined criteria which more accurately reflect congressional intent. "But the unconstitutionality of the course pursued has now been made clear" and compels us to abandon the implication doctrine of *Cort. Erie R. Co.* v. *Tompkins,* 304 U. S. 64, 77–78 (1938).

As the above-cited 20 decisions of the Courts of Appeals illustrate, *Cort* allows the Judicial Branch to assume policymaking authority vested by the Constitution in the Legislative Branch. It also invites Congress to avoid resolution of the often controversial question whether a new regulatory statute should be enforced through private litigation. Rather than confronting the hard political choices involved, Congress is encouraged to shirk its constitutional obligation and leave the issue to the courts to decide.[14] When this happens, the legislative process with its public scrutiny and participation has been bypassed, with attendant prejudice to everyone concerned. Because the courts are free to reach a result different from that which the normal play of political forces would have produced, the intended beneficiaries of the legislation are unable to ensure the full measure of protection their needs may warrant. For the same reason, those subject to the legislative constraints are denied the opportunity to forestall through the political process potentially unnecessary and disruptive litigation. Moreover, the public generally is denied the benefits that are derived from the making of important societal choices through the open debate of the democratic process.

The Court's implication doctrine encourages, as a corollary to the political default by Congress, an increase in the govern-

[14] MR. JUSTICE REHNQUIST, perhaps considering himself temporarily bound by his position in *University of California Regents* v. *Bakke*, 438 U. S. 265, 418–421 (1978) (opinion of STEVENS, J.), concurs in the Court's decision today. But writing briefly, he correctly observes "that Congress, at least during the period of the enactment of the several Titles of the Civil Rights Act, tended to rely to a large extent on the courts to *decide* whether there should be a private right of action, rather than determining this question for itself," *ante*, at 718. It does not follow, however, that this Court is obliged to indulge Congress in its refusal to confront these hard questions. In my view, the very reasons advanced by MR. JUSTICE REHNQUIST why "this Court in the future should be extremely reluctant to imply a cause of action" absent specific direction by Congress, *ibid.*, apply to this case with special force.

mental power exercised by the federal judiciary. The dangers posed by judicial arrogation of the right to resolve general societal conflicts have been manifest to this Court throughout its history. See *Schlesinger* v. *Reservists to Stop the War*, 418 U. S. 208, 222 (1974); *United States* v. *Richardson*, 418 U. S. 166, 188–197 (1974) (POWELL, J., concurring); *Eccles* v. *Peoples Bank*, 333 U. S. 426, 432 (1948); *Ashwander* v. *TVA*, 297 U. S. 288, 345–348 (1936) (Brandeis, J., concurring); *Muskrat* v. *United States*, 219 U. S. 346, 362 (1911); *Sinking-Fund Cases*, 99 U. S. 700, 718 (1879) ("One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule"); *Hayburn's Case*, 2 Dall. 409 (1792). As the Court observed only last Term:

> "Our system of government is, after all, a tripartite one, with each branch having certain defined functions delegated to it by the Constitution. While '[i]t is emphatically the province and duty of the judicial department to say what the law is,' *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803), it is equally—and emphatically—the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation. Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought.
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> . . . . .
>
> "Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process

> comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto." *TVA* v. *Hill*, 437 U. S. 153, 194–195 (1978).

See also *United States* v. *New York Telephone Co.*, 434 U. S. 159, 179 (1977) (STEVENS, J., dissenting) ("The principle of limited federal jurisdiction is fundamental . . .").[15]

It is true that the federal judiciary necessarily exercises substantial powers to construe legislation, including, when appropriate, the power to prescribe substantive standards of conduct that supplement federal legislation. But this power normally is exercised with respect to disputes over which a court already has jurisdiction, and in which the existence of

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[15] Mr. Justice Frankfurter described these dangers with characteristic eloquence:

"Disregard of inherent limits in the effective exercise of the Court's 'judicial Power' . . . may well impair the Court's position as the ultimate organ of 'the supreme Law of the Land' in that vast range of legal problems, often strongly entangled in popular feeling, on which this Court must pronounce. The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements." *Baker* v. *Carr*, 369 U. S., at 267 (dissenting opinion).

Alexander Bickel identified the practical difficulties in judicial exercise of governmental power:

"The judicial process is too principle-prone and principle-bound—it has to be, there is no other justification or explanation for the role it plays. It is also too remote from conditions, and deals, case by case, with too narrow a slice of reality. It is not accessible to all the varied interests that are in play in any decision of great consequence. It is, very properly, independent. It is passive. It has difficulty controlling the stages by which it approaches a problem. It rushes forward too fast, or it lags; its pace hardly ever seems just right. For all these reasons, it is, in a vast, complex, changeable society, a most unsuitable instrument for the formation of policy." The Supreme Court and the Idea of Progress 175 (1970).

the asserted cause of action is established.[16] Implication of a private cause of action, in contrast, involves a significant additional step. By creating a private action, a court of limited jurisdiction necessarily extends its authority to embrace a dispute Congress has not assigned it to resolve. Cf. *Jacobson* v. *New York, N. H. & H. R. Co.*, 206 F. 2d 153 (CA1 1953) (Magruder, C. J.), aff'd *per curiam*, 347 U. S. 909 (1954); Note, Implying Civil Remedies From Federal Regulatory Statutes, 77 Harv. L. Rev. 285, 286–287 (1963).[17] This

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[16] See, *e. g.*, *United States* v. *Kimbell Foods, Inc.*, 440 U. S. 715 (1979); *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448 (1957); *Clearfield Trust Co.* v. *United States*, 318 U. S. 363 (1943); P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, Hart and Wechsler's The Federal Courts and the Federal System 756–832 (1973); Friendly, In Praise of *Erie*—And of the New Federal Common Law, 39 N. Y. U. L. Rev. 383 (1964).

[17] Because a private action implied from a federal statute has as an element the violation of that statute, see n. 1, *supra*, the action universally has been considered to present a federal question over which a federal court has jurisdiction under 28 U. S. C. § 1331. Thus, when a federal court implies a private action from a statute, it necessarily expands the scope of its federal-question jurisdiction.

It is instructive to compare decisions implying private causes of action to those cases that have found nonfederal causes of action cognizable by a federal court under § 1331. *E. g.*, *Smith* v. *Kansas City Title & Trust Co.*, 255 U. S. 180 (1921). Where a court decides both that federal-law elements are present in a state-law cause of action, and that these elements predominate to the point that the action can be said to present a "federal question" cognizable in federal court, the net effect is the same as implication of a private action directly from the constitutional or statutory source of the federal-law elements. Compare *Division 1287, Amalgamated Transit Union* v. *Kansas City Area Transportation Authority*, 582 F. 2d 444 (CA8 1978), cert. denied, 439 U. S. 1090 (1979); *Local 519, Amalgamated Transit Union* v. *LaCrosse Municipal Transit Utility*, 585 F. 2d 1340 (CA7 1978), with *Local 519, Amalgamated Transit Union* v. *Greater Portland Transit Dist.*, 589 F. 2d 1 (CA1 1978). To the extent an expansive interpretation of § 1331 permits federal courts to assume control over disputes which Congress did not consign to the federal judicial process, it is subject to the same criticisms of judicial implication of private actions discussed in the text.

runs contrary to the established principle that "[t]he jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation . . . ," *American Fire & Cas. Co.* v. *Finn*, 341 U. S. 6, 17 (1951), and conflicts with the authority of Congress under Art. III to set the limits of federal jurisdiction. *Lockerty* v. *Phillips*, 319 U. S. 182 (1943); *Kline* v. *Burke Construction Co.*, 260 U. S. 226 (1922); *Sheldon* v. *Sill*, 8 How. 441 (1850); *United States* v. *Nourse*, 6 Pet. 470 (1832); Wechsler, The Courts and the Constitution, 65 Colum. L. Rev. 1001, 1004–1008 (1965).

The facts of this case illustrate how the implication of a right of action not authorized by Congress denigrates the democratic process. Title IX embodies a national commitment to the elimination of discrimination based on sex, a goal the importance of which has been recognized repeatedly by our decisions. See, *e. g.*, *Caban* v. *Mohammed*, *ante*, p. 380; *Orr* v. *Orr*, 440 U. S. 268 (1979); *Califano* v. *Goldfarb*, 430 U. S. 199 (1977); *Frontiero* v. *Richardson*, 411 U. S. 677 (1973); *Reed* v. *Reed*, 404 U. S. 71 (1971). But Because Title IX applies to most of our Nation's institutions of higher learning, it also trenches on the authority of the academic community to govern itself, an authority the free exercise of which is critical to the vitality of our society. See *University of California Regents* v. *Bakke*, 438 U. S. 265, 311 (1978) (opinion of POWELL, J.); *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967); *Sweezy* v. *New Hampshire*, 354 U. S. 234, 263 (1957) (Frankfurter, J., concurring in result); Murphy, Academic Freedom—An Emerging Constitutional Right, 28 Law & Contemp. Prob. 447 (1963); Note, Academic Freedom and Federal Regulation of University Hiring, 92 Harv. L. Rev. 879 (1979). Arming frustrated applicants with the power to challenge in court his or her rejection inevitably will have a constraining effect on admissions programs. The burden of expensive, vexatious litigation upon institutions whose resources often are severely limited may well compel an emphasis on objectively measured academic qualifications

at the expense of more flexible admissions criteria that bring richness and diversity to academic life.[18] If such a significant incursion into the arena of academic polity is to be made, it is the constitutional function of the Legislative Branch, subject as it is to the checks of the political process, to make this judgment.[19]

Congress already has created a mechanism for enforcing the mandate found in Title IX against gender-based discrimination. At least in the view of Congress, the fund-termination power conferred on HEW is adequate to ensure that dis-

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[18] Although the burdens of administrative regulation applied to colleges and universities through Title IX are not insubstantial, that process is at least under the control of Government officials whose personal interests are not directly implicated and whose actions are subject to congressional oversight. Private litigation, by contrast, is subject to no such checks.

[19] We have recognized in other contexts that implication of a private cause of action can frustrate those alternative processes that exist to resolve such disputes and, given the costs of federal litigation today, may dramatically revise the balance of interests struck by the legislation. See *Santa Fe Industries* v. *Green*, 430 U. S., at 478–479; *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S., at 739–744. That this concern applies fully to litigation under Title IX is borne out by the facts of this case. Petitioner's undergraduate grade-point average in basic sciences was 3.17, far below the 3.70 overall average of the University of Chicago's entering class, and her medical college admission test scores were in the bottom half of the applicant group. More than 2,000 applicants for the 104 positions at Chicago had better academic qualifications than petitioner. Furthermore, petitioner's age exceeded restrictions at both Chicago and Northwestern. If Title IX prohibits only purposeful discrimination such as would violate the Constitution were state action involved, a conclusion that seems forgone in light of our holding with respect to Title VI of the Civil Rights Act of 1964 in *University of California Regents* v. *Bakke*, 438 U. S., at 284–287 (opinion of POWELL, J.); *id.*, at 328–350 (opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.), then the chances of petitioner's proving that the neutral age requirements used by Chicago and Northwestern are unlawful seem infinitesimal. Yet these schools have been forced to use their scarce resources to defend against this suit at three levels of our federal judicial system, and in light of the Court's holding today they must contend with at least one more round of proceedings.

crimination in federally funded colleges and universities will not be countenanced. The current position of the Government notwithstanding,[20] overlapping judicial and administrative enforcement of these policies inevitably will lead to conflicts and confusion; our national goal of equal opportunity for men and women, as well as the academic community, may suffer. A federal court should resolve all doubts against this kind of self-aggrandizement, regardless of the temptation to lend its assistance to the furtherance of some remedial end deemed attractive.

III

In sum, I believe the need both to restrain courts that too readily have created private causes of action, and to encourage Congress to confront its obligation to resolve crucial policy questions created by the legislation it enacts, has become compelling. Because the analysis suggested by *Cort* has proved inadequate to meet these problems, I would start afresh. Henceforth, we should not condone the implication of any private action from a federal statute absent the most compelling evidence that Congress in fact intended such an action to exist. Where a statutory scheme expressly provides for an alternative mechanism for enforcing the rights and duties created, I would be especially reluctant ever to permit a federal court to volunteer its services for enforcement purposes. Because the Court today is enlisting the federal judiciary in just such an enterprise, I dissent.

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[20] See Brief for Federal Respondents 58–60, n. 36.

OSCAR MAYER & CO. ET AL. *v.* EVANS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 78–275. Argued February 28, 1979—Decided May 21, 1979

Section 14 (b) of the Age Discrimination in Employment Act of 1967 (ADEA) provides that in the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and authorizing a state authority to grant and seek relief from such discriminatory practice, no suit may be brought under § 7 (c) of the ADEA before the expiration of 60 days after proceedings have been commenced under the state law, unless such proceedings have been earlier terminated. Section 14 (b) also provides that if any requirement for the commencement of such proceedings is imposed by a state authority other than a requirement of a filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of § 14 (b) at the time such statement is sent by registered mail to the appropriate state authority. Respondent, who had been involuntarily retired after 23 years of employment by petitioner company, filed with the United States Department of Labor a notice of intent to sue the company under the ADEA, charging that he had been forced to retire because of his age in violation of the Act. Upon respondent's inquiry, the Department informed him that the ADEA contained no requirement that he file a state complaint in order to preserve his federal rights. After federal conciliation efforts failed, respondent brought suit against petitioner company and company officials in Federal District Court, which denied petitioners' motion to dismiss the complaint on the grounds that the Iowa State Civil Rights Commission was empowered to remedy age discrimination in employment and that § 14 (b) required resort to this state remedy prior to the commencement of the federal suit. The Court of Appeals affirmed.

Held:

1. Under § 14 (b), resort to administrative remedies by claimants in States with agencies empowered to remedy age discrimination in employment (deferral States) is mandatory, not optional, and federal suit may not be brought under the ADEA unless the claimant has first commenced a proceeding with the appropriate state agency. Pp. 754–758.

(a) Since the ADEA and Title VII of the Civil Rights Act of 1964

share the common purpose of the elimination of discrimination in the workplace, since the language of § 14 (b) is almost *in haec verba* with § 706 (c) of Title VII, which has been interpreted to require individuals in deferral States to resort to appropriate state proceedings before bringing suit under Title VII, and since the legislative history of § 14 (b) indicates that its source was § 706 (c), it may be properly concluded that Congress intended that the construction of § 14 (b) should follow that of § 706 (c). Pp. 755–756.

(b) Claimants do not have the option to ignore state remedies merely because under the ADEA, unlike Title VII, they may file with state and federal agencies simultaneously. The ADEA permits concurrent rather than sequential state and federal administrative jurisdiction in order to expedite the processing and settling of age discrimination claims, and thus the possibility of concurrent state and federal cognizance does not support the construction of § 14 (b) that ADEA grievants may ignore state remedies altogether. A Committee Report accompanying 1978 ADEA amendments which suggested that resort to state remedies should be optional under § 14 (b) is insufficient to overcome the clear and convincing evidence that Congress, in 1967, intended § 14 (b) to have the same meaning as § 706 (c). Pp. 756–758.

2. However, a grievant is not required by § 14 (b) to commence state proceedings within time limits specified by state law. Pp. 758–764.

(a) By its terms, § 14 (b) requires only that state proceedings be "commenced" 60 days before federal litigation is instituted, and use of the word "commenced" strongly implies that state limitations periods are irrelevant. This implication is made express by the provision in § 14 (b) that if a state authority imposes requirements "other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based," the proceeding shall be deemed to have been commenced for purposes of § 14 (b) at the time such statement is sent by registered mail to the appropriate state authority. State limitations periods are requirements other than that specified in § 14 (b) and, thus, even if a State were to make timeliness a precondition for commencement, a state proceeding will be deemed commenced for purposes of § 14 (b) as soon as the complaint is filed. Pp. 759–760.

(b) This construction of the statute is consistent both with the ADEA's remedial purposes and with the purposes of § 14 (b), which does not stipulate an exhaustion requirement, but is intended only to give state agencies a limited opportunity to settle the grievances of ADEA claimants in a voluntary and localized manner so that the grievants thereafter have no need or desire for independent federal relief.

The ADEA's structure—setting forth limitations periods in explicit terms in §§ 7 (d) and (e), not § 14 (b)—reinforces the conclusion that state procedural defaults cannot foreclose federal relief and that state limitations periods cannot govern the efficacy of the federal remedy. Pp. 761–764.

3. Even though Iowa's 120-day statute of limitations has run, respondent may yet comply with the requirements of § 14 (b) by simply filing a signed complaint with the Iowa State Civil Rights Commission. That Commission must be given an opportunity to entertain respondent's grievance before his federal litigation can continue. Meanwhile the federal suit should be held in abeyance, rather than be dismissed with leave to refile, because respondent has already filed a timely federal complaint and to require a second filing would serve no purpose other than the creation of an additional procedural technicality. If respondent's state complaint is subsequently dismissed as untimely, he may then return to federal court; but until that happens, or until 60 days have passed without a settlement, respondent must pursue his state remedy. Pp. 764–765.

580 F. 2d 298, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which STEWART, WHITE, MARSHALL, and BLACKMUN, JJ., joined, and in all but Part III of which BURGER, C. J., and POWELL, REHNQUIST, and STEVENS, JJ., joined. BLACKMUN, J., filed a concurring opinion, *post*, p. 765. STEVENS, J., filed an opinion concurring in part and dissenting in part, in which BURGER, C. J., and POWELL and REHNQUIST, JJ., joined, *post*, p. 767.

James W. Gladden, Jr., argued the cause for petitioners. With him on the briefs were *Arthur J. Kowitt* and *William J. Reifman.*

Mark W. Bennett argued the cause for respondent. With him on the brief was *Gordon E. Allen.* *Allan A. Ryan, Jr.*, argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General McCree, Deputy Solicitor General Easterbrook,* and *Dennis D. Clark.**

**Stephen A. Bokat* and *Stanley T. Kaleczyc* filed a brief for the Chamber of Commerce of the United States as *amicus curiae* urging reversal.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Section 14 (b) of the Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat. 607, as set forth in 29 U. S. C. § 633 (b), provides in pertinent part:

> "In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: *Provided*, . . . [i]f any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority."

This case presents three questions under that section. First, whether § 14 (b) requires an aggrieved person to resort to appropriate state remedies before bringing suit under § 7 (c) of the ADEA, 29 U. S. C. § 626 (c). Second, if so, whether the state proceedings must be commenced within time limits specified by state law in order to preserve the federal right of action. Third, if so, whether any circumstances may excuse the failure to commence timely state proceedings.

We hold that § 14 (b) mandates that a grievant not bring suit in federal court under § 7 (c) of the ADEA until he has first resorted to appropriate state administrative proceedings. We also hold, however, that the grievant is not required by § 14 (b) to commence the state proceedings within time limits specified by state law. In light of these holdings, it is not

necessary to address the question of the circumstances, if any, in which failure to comply with § 14 (b) may be excused.

I

Respondent Joseph Evans was employed by petitioner Oscar Mayer & Co. for 23 years until his involuntary retirement in January 1976. On March 10, 1976, respondent filed with the United States Department of Labor a notice of intent to sue the company under the ADEA. Respondent charged that he had been forced to retire because of his age in violation of the Act. At approximately this time respondent inquired of the Department whether he was obliged to file a state complaint in order to preserve his federal rights. The Department informed respondent that the ADEA contained no such requirement. Relying on this official advice, respondent refrained from resorting to state proceedings. On March 7, 1977, after federal conciliation efforts had failed, respondent brought suit against petitioner company and company officials in the United States District Court for the Southern District of Iowa.

Petitioners moved to dismiss the complaint on the grounds that the Iowa State Civil Rights Commission was empowered to remedy age discrimination in employment and that § 14 (b) required resort to this state remedy prior to the commencement of the federal suit. The District Court denied the motion, and the Court of Appeals for the Eighth Circuit affirmed.[1] 580 F. 2d 298 (1978). We granted certiorari, 439 U. S. 925 (1978). We reverse.

II

Petitioners argue that § 14 (b) mandates that in States with agencies empowered to remedy age discrimination in employment (deferral States) a grievant may not bring suit

[1] The Court of Appeals initially reversed the District Court but on rehearing withdrew its opinion and substituted an opinion affirming the District Court.

under the ADEA unless he has first commenced a proceeding with the appropriate state agency. Respondent, on the other hand, argues that the grievant has the option of whether to resort to state proceedings, and that § 14 (b) requires only that grievants choosing to resort to state remedies wait 60 days before bringing suit in federal court. The question of construction is close, but we conclude that petitioners are correct.

Section 14 (b) of the ADEA was patterned after and is virtually *in haec verba* with § 706 (c) of Title VII of the Civil Rights Act of 1964 (formerly § 706 (b)), 78 Stat. 259, as redesignated, 86 Stat. 104, 42 U. S. C. § 2000e–5 (c).[2] The relevant portion of § 706 (c) reads as follows:

> "In the case of an alleged unlawful employment practice occurring in a State, . . . which has a . . . law prohibiting the unlawful employment practice alleged and establishing or authorizing a State . . . authority to grant or seek relief from such practice . . . , no charge may be filed . . . by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State . . . law, unless such proceedings have been earlier terminated . . . ."

Congress intended through § 706 (c) to screen from the federal courts those problems of civil rights that could be settled to the satisfaction of the grievant in "a voluntary and localized manner." See 110 Cong. Rec. 12725 (1964) (remarks of Sen. Humphrey). The section is intended to give state agencies a limited opportunity to resolve problems of employment discrimination and thereby to make unnecessary, resort to federal relief by victims of the discrimination. See *Voutsis* v. *Union Carbide Corp.*, 452 F. 2d 889 (CA2 1971).

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[2] See Hearings on S. 830 et al. before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 90th Cong., 1st Sess., 102 (1967) (testimony of Mr. Biemiller); *id.*, at 228 (testimony of Mr. Conway).

Because state agencies cannot even attempt to resolve discrimination complaints not brought to their attention, the section has been interpreted to require individuals in deferral States to resort to appropriate state proceedings before bringing suit under Title VII. See *Love* v. *Pullman Co.*, 404 U. S. 522 (1972); *Olson* v. *Rembrandt Printing Co.*, 511 F. 2d 1228 (CA8 1975).[3]

Since the ADEA and Title VII share a common purpose, the elimination of discrimination in the workplace, since the language of § 14 (b) is almost *in haec verba* with § 706 (c), and since the legislative history of § 14 (b) indicates that its source was § 706 (c), we may properly conclude that Congress intended that the construction of § 14 (b) should follow that of § 706 (c). See *Northcross* v. *Memphis Board of Education*, 412 U. S. 427, 428 (1973). We therefore conclude that § 14 (b), like § 706 (c), is intended to screen from the federal courts those discrimination complaints that might be settled to the satisfaction of the grievant in state proceedings. We further conclude that prior resort to appropriate state proceedings is required under § 14 (b), just as under § 706 (c).

The contrary arguments advanced by respondent in support of construing § 14 (b) as merely optional are not persuasive. Respondent notes first that under Title VII persons aggrieved must file with a state antidiscrimination agency before filing with the Equal Employment Opportunity Commission (EEOC). See 42 U. S. C. § 2000e–5 (c). Under the ADEA, by contrast, grievants may file with state and federal agencies simultaneously. See 29 U. S. C. §§ 626 (d) and 633 (b).[4] From this respondent concludes that the ADEA pays less deference to state agencies and that, as a consequence, ADEA claimants have the option to ignore state remedies.

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[3] Even respondent concedes that under § 706 (c) resort to appropriate state proceedings is mandatory, not optional. See Brief for Respondent 18.

[4] ADEA grievants may file with the State before or after they file with the Secretary of Labor.

We disagree. The ADEA permits concurrent rather than sequential state and federal administrative jurisdiction in order to expedite the processing of age-discrimination claims. The premise for this difference is that the delay inherent in sequential jurisdiction is particularly prejudicial to the rights of "older citizens to whom, by definition, relatively few productive years are left." 113 Cong. Rec. 7076 (1967) (remarks of Sen. Javits).

The purpose of expeditious disposition would not be frustrated were ADEA claimants required to pursue state and federal administrative remedies simultaneously. Indeed, simultaneous state and federal conciliation efforts may well facilitate rapid settlements. There is no reason to conclude, therefore, that the possibility of concurrent state and federal cognizance supports the construction of § 14 (b) that ADEA grievants may ignore state remedies altogether.

Respondent notes a second difference between the ADEA and Title VII. Section 14 (a) of the ADEA, 29 U. S. C. § 633 (a), for which Title VII has no counterpart, provides that upon commencement of an action under ADEA, all state proceedings are superseded. From this, respondent concludes that it would be an exercise in futility to require aggrieved persons to file state complaints since those persons may, after only 60 days, abort their involuntary state proceeding by filing a federal suit.

We find no merit in the argument. Unless § 14 (b) is to be stripped of all meaning, state agencies must be given at least some opportunity to solve problems of discrimination. While 60 days provides a limited time for the state agency to act, that was a decision for Congress to make and Congress apparently thought it sufficient. As Senator Dirksen told the Senate during the debates on § 14 (b)'s predecessor, § 706 (c) of Title VII:

> "[A]t the local level . . . many cases are disposed of in a matter of days, and certainly not more than a few weeks.

> In the case of California, FEPC cases are disposed of in an average of about 5 days. In my own State it is approximately 14 days." 110 Cong. Rec. 13087 (1964).

Respondent argues finally that a Committee Report that accompanied 1978 ADEA amendments supports his construction of § 14 (b).[5] This Committee Report suggested that resort to state remedies should be optional under § 14 (b). See S. Rep. No. 95–493, pp. 6–7 (1978), adopted in Joint Explanatory Statement of the Committee of Conference, H. R. Conf. Rep. No. 95–950, pp. 7, 12 (1978).

We are not persuaded. Senate Report No. 95–493 was written 11 years after the ADEA was passed in 1967, and such "[l]egislative observations . . . are in no sense part of the legislative history." *United Airlines, Inc.* v. *McMann*, 434 U. S. 192, 200 n. 7 (1977). "It is the intent of the Congress that enacted [the section] . . . that controls." *Teamsters* v. *United States*, 431 U. S. 324, 354 n. 39 (1977). Whatever evidence is provided by the 1978 Committee Report of the intent of Congress in 1967, it is plainly insufficient to overcome the clear and convincing evidence that Congress intended § 14 (b) to have the same meaning as § 706 (c). We therefore hold that under § 14 (b) of the ADEA, as under § 706 (c) of Title VII, resort to administrative remedies in deferral States by individual claimants is mandatory, not optional.[6]

III

We consider now the consequences of respondent's failure to file a complaint with the Iowa State Civil Rights Commission. Petitioners argue that since Iowa's 120-day age-dis-

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[5] Respondent concedes that the amendments themselves "are not relevant to the questions raised in this case." Brief for Respondent 3 n. 1.

[6] This rule, of course, governs only claims for individual relief, such as the present case. Nothing in our decision in anywise disturbs the rule of *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 414 n. 8 (1975), concerning the rights of unnamed parties in plaintiff class actions.

crimination statute of limitations has run, see Iowa Code §§ 601A.14 (1), (15) (1975), it is now too late for respondent to remedy his procedural omission and that respondent's federal action is therefore jurisdictionally barred. Respondent pleads that since his failure to file was due to incorrect advice by the Department of Labor, his tardiness should be excused.

Both arguments miss the mark. Neither questions of jurisdiction nor questions of excuse arise unless Congress mandated that resort to state proceedings must be within time limits specified by the State. We do not construe § 14 (b) to make that requirement. Section 14 (b) requires only that the grievant *commence* state proceedings. Nothing whatever in the section requires the respondent here to commence those proceedings within the 120 days allotted by Iowa law in order to preserve a right of action under § 7 (c).

We start with the language of the section. Section 14 (b) provides, in relevant part, that

> "no suit may be brought . . . before the expiration of sixty days after proceedings have been *commenced* under the State law, unless such proceedings have been earlier terminated." 29 U. S. C. § 633 (b) (emphasis added).

By its terms, then, the section requires only that state proceedings be commenced 60 days before federal litigation is instituted; besides commencement no other obligation is placed upon the ADEA grievant. In particular, there is no requirement that, in order to commence state proceedings and thereby preserve federal rights, the grievant must file with the State within whatever time limits are specified by state law. Rather, use of the word "commenced" strongly implies the opposite—that state limitations periods are irrelevant—since, by way of analogy, under the Federal Rules of Civil Procedure even a time-barred action may be "commenced" by the filing of a complaint. See Fed. Rule Civ. Proc. 3; *Magalotti* v. *Ford Motor Co.*, 418 F. Supp. 430, 434 (ED Mich. 1976).

This implication is made express by the last sentence of § 14 (b), which specifically provides:

> "If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority." 29 U. S. C. § 633 (b).

State limitations periods are, of course, requirements "other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based." Therefore, even if a State were to make timeliness a precondition for commencement, rather than follow the more typical pattern of making untimeliness an affirmative defense, a state proceeding will be deemed commenced for purposes of § 14 (b) as soon as the complaint is filed.

This has been the prevailing interpretation of § 14 (b). See *Nickel* v. *Shatterproof Glass Corp.*, 424 F. Supp. 884 (ED Mich. 1976); *Magalotti* v. *Ford Motor Co.*, *supra*.[7] It is also the prevailing interpretation of § 14 (b)'s counterpart, § 706 (e) of Title VII, which contains an identical definition of commencement. See *Davis* v. *Valley Distributing Co.*, 522 F. 2d 827, 831–833 (CA9 1975), cert. denied, 429

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[7] A number of cases have reached a similar result upon slightly different theories. See, *e. g.*, *Skoglund* v. *Singer Co.*, 403 F. Supp. 797 (NH 1975) (timely state complaint not required unless there has been a deliberate bypass of state procedure); *Bertsch* v. *Ford Motor Co.*, 415 F. Supp. 619 (ED Mich. 1976) (timely state complaint not required if state limitations period significantly shorter than 180 days). See also *Vaughn* v. *Chrysler Corp.*, 382 F. Supp. 143 (ED Mich. 1974) (timely state complaint not required if claimant detrimentally relied upon mistaken official advice). Two cases have reached contrary results. See *Graham* v. *Chrysler Corp.*, 15 FEP Cases 876 (ED Mich. 1976); *McGhee* v. *Ford Motor Co.*, 15 FEP Cases 869 (ED Mich. 1976).

U. S. 1090 (1977); *Olson* v. *Rembrandt Printing Co.*, 511 F. 2d, at 1232; *Pinckney* v. *County of Northampton*, 433 F. Supp. 373, 376 n. 1 (ED Pa. 1976); *McAdams* v. *Thermal Industries, Inc.*, 428 F. Supp. 156, 161 (WD Pa. 1977); *De Gideo* v. *Sperry-Univac Co.*, 415 F. Supp. 227, 229 (ED Pa. 1976); see also *White* v. *Dallas Independent School Dist.*, 581 F. 2d 556, 562 n. 10 (CA5 1978) (en banc) (filing with EEOC tolls state limitations period for federal purposes); *Ferguson* v. *Kroger Co.*, 545 F. 2d 1034 (CA6 1976) (EEOC's negligent failure to refer charge to state agency within state limitations period does not foreclose federal claim). But see *Richardson* v. *Miller*, 446 F. 2d 1247 (CA3 1971).

It is also the EEOC's interpretation of § 706 (c), see Case No. KC7–5–315, CCH EEOC Decisions (1973) ¶ 6024 (1969), and as such is "entitled to great deference." *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 434 (1971).

This construction of the statute is fully consistent with the ADEA's remedial purposes and is particularly appropriate "in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." *Love* v. *Pullman Co.*, 404 U. S., at 527.

It is also consistent with the purposes of § 14 (b). Section 14 (b) does not stipulate an exhaustion requirement. The section is intended only to give state agencies a limited opportunity to settle the grievances of ADEA claimants in a voluntary and localized manner so that the grievants thereafter have no need or desire for independent federal relief. Individuals should not be penalized if States decline, for whatever reason, to take advantage of these opportunities. See *Pacific Maritime Assn.* v. *Quinn*, 465 F. 2d 108 (CA9 1972). Congress did not intend to foreclose federal relief simply because state relief was also foreclosed. See *Voutsis* v. *Union Carbide Corp.*, 452 F. 2d, at 893.[8]

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[8] This is made clear by Senator Humphrey's remarks to the Senate concerning the limits of federal deference under § 706 (c):

"[W]e recognized the absolute necessity of providing the Federal Govern-

The structure of the ADEA reinforces the conclusion that state procedural defaults cannot foreclose federal relief and that state limitations periods cannot govern the efficacy of the federal remedy. The ADEA's limitations periods are set forth in explicit terms in 29 U. S. C. §§ 626 (d) [9] and (e),[10] not § 14 (b), 29 U. S. C. § 633 (b). Sections 626 (d) and (e) adequately

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ment with authority to act in instances where States and localities did not choose to exercise these opportunities to solve the problem of civil rights in a voluntary and localized manner. The basic rights protected by [Title VII] are rights which accrue to citizens of the United States; the Federal Government has the clear obligation to see that these rights are fully protected. In instances where States are unable or unwilling to provide this protection, the Federal Government must have the authority to act." 110 Cong. Rec. 12725 (1964).

[9] Title 29 U. S. C. § 626 (d) provides:

"No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed—

"(1) within one hundred and eighty days after the alleged unlawful practice occurred, or

"(2) in a case to which section 633 (b) of this title applies, within three hundred days after the alleged unlawful practice occurred or within thirty days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

"Upon receiving a notice of intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion."

[10] Title 29 U. S. C. § 626 (e) provides:

"Sections 255 and 259 of this title shall apply to actions under this chapter."

Title 29 U. S. C. § 255 provides in relevant part:

"Any action commenced on or after May 14, 1947 . . .

"(a) if the cause of action accrues on or after May 14, 1947—may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued."

protect defendants against stale claims. We will not attribute to Congress an intent through § 14 (b) to add to these explicit requirements by implication and to incorporate by reference into the ADEA the various state age-discrimination statutes of limitations. Cf. *Occidental Life Ins. Co.* v. *EEOC*, 432 U. S. 355, 371 (1977). Congress could not have intended to consign federal lawsuits to the "vagaries of diverse state limitations statutes," *ibid.*, particularly since, in many States, including Iowa, the limitations periods are considerably shorter than the 180-day period allowed grievants in nondeferral States by 29 U. S. C. § 626 (d)(1). See *De Gideo* v. *Sperry-Univac Co.*, *supra*, at 231 n. 9.

That Congress regarded incorporation as inconsistent with the federal scheme is made clear by the legislative history of § 706 (c)'s definition of commencement—the same definition later used in § 14 (b). Proponents of Title VII were concerned that localities hostile to civil rights might enact sham discrimination ordinances for the purpose of frustrating the vindication of federal rights. See 2 B. Schwartz, Statutory History of the United States: Civil Rights 1330 (1970). The statutory definition of commencement as requiring the filing of a state complaint and nothing more was intended to meet this concern while at the same time avoiding burdensome case-by-case inquiry into the reasonableness of various state procedural requirements. Cf. *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449 (1958). As Senator Humphrey explained to the Senate:

> "[T]o avoid the possible imposition of onerous State requirements for initiating a proceeding, subsection (b) provides that to comply with the requirement of prior resort to the State agency, an individual need merely send a written statement of the facts to the State agency by registered mail." 2 Schwartz, *supra*, at 1352.

The strongest argument against this construction of the statute is that it would permit grievants to avoid state inter-

vention by waiting until the state statute of limitations has expired and then filing federal suit, thus frustrating the intent of Congress that federal litigation be used as a last resort.

No reason suggests itself, however, why an employee would wish to forgo an available state remedy. Prior resort to the state remedy would not impair the availability of the federal remedy, for the two are supplementary, not mutually exclusive. A complainant would save no time by bypassing the state remedy since the federal court must, in any event, defer to the State for 60 days, and is required to defer no longer. See *Davis* v. *Valley Distributing Co.*, 522 F. 2d 827 (CA9 1975); *Nickel* v. *Shatterproof Glass Corp.*, 424 F. Supp. 884 (ED Mich. 1976).[11]

We therefore hold that respondent may yet comply with the requirements of § 14 (b) by simply filing a signed complaint with the Iowa State Civil Rights Commission. That Commission must be given an opportunity to entertain respondent's grievance before his federal litigation can continue. Meanwhile, the federal suit should be held in abeyance. If, as respondent fears, his state complaint is subsequently dismissed as untimely, respondent may then return to federal

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[11] Moreover, even the danger that state remedies will be *inadvertently* bypassed by otherwise proper ADEA plaintiffs will soon become nonexistent. After July 1, 1979, the EEOC will administer the ADEA. See Reorg. Plan No. 1 of 1978, 3 CFR 321 (1979). Discrimination charges will have to be filed with the EEOC within time limits specified by federal law, and the EEOC already has a regular procedure whereby discrimination complaints are automatically referred to appropriate agencies as soon as they are received. See *Love* v. *Pullman Co.*, 404 U. S. 522 (1972); 29 CFR § 1601.13 (1978). Thus, the deference to state agencies required by § 14 (b) will soon become automatic.

In any event, even if the risk of bypass of state agencies were real, which it is not, States could readily avoid the possibility by extending their limitations periods to 180 days and by tolling their statutes of limitations upon the filing of a timely charge with the Department of Labor. See *Davis* v. *Valley Distributing Co.* Cf. *Burnett* v. *New York Central R. Co.*, 380 U. S. 424 (1965).

court.[12] But until that happens, or until 60 days have passed without a settlement, respondent must pursue his state remedy.

Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded to that court with instructions to enter an order directing the District Court to hold respondent's suit in abeyance until respondent has complied with the mandate of § 14 (b).[13]

It is so ordered.

MR. JUSTICE BLACKMUN, concurring.

My preference in this case would have been to affirm the judgment of the Court of Appeals. I am so inclined because I regard the Age Discrimination in Employment Act to be a remedial statute that is to be liberally construed, and because

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[12] Whether Iowa may toll its statute of limitations from the date that respondent contacted the Department of Labor is a question of Iowa law not for our decision. See *Iowa Civil Rights Comm'n* v. *Massey-Ferguson, Inc.*, 207 N. W. 2d 5, 8 (Iowa 1973).

[13] Suspension of proceedings is preferable to dismissal with leave to refile. Respondent's timely complaint has already satisfied the requirements of 29 U. S. C. § 626 (e). "To require a second 'filing' by the aggrieved party after termination of state proceedings would serve no purpose other than the creation of an additional procedural technicality. Such technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." *Love* v. *Pullman Co.*, *supra*, at 526–527 (charge may be held in suspended animation during deferral period). For this reason, suspension pending deferral is the preferred practice in the federal courts. See *Crosslin* v. *Mountain States Tel. & Tel. Co.*, 400 U. S. 1004 (1971) (judgment of dismissal for want of jurisdiction arising from failure to defer vacated; case remanded for consideration of stay pending deferral); *Gabriele* v. *Chrysler Corp.*, 573 F. 2d 949, 956 n. 18 (CA6 1978); *Oubichon* v. *North American Rockwell Corp.*, 482 F. 2d 569, 571 (CA9 1973); *Parker* v. *General Telephone Co. of the Northwest, Inc.*, 476 F. 2d 595, 596 (CA9 1973); *Mitchell* v. *Mid-Continent Spring Co. of Ky.*, 466 F. 2d 24, 26–27 (CA6 1972), cert. denied, 410 U. S. 928 (1973); *Motorola, Inc.* v. *EEOC*, 460 F. 2d 1245, 1246 (CA9 1972); *Bertrand* v. *Orkin Exterminating Co., Inc.*, 419 F. Supp. 1123, 1130 (ND Ill. 1976); *Winsey* v. *Pace College*, 394 F. Supp. 1324, 1329 (SDNY 1975).

I feel that an affirmance would give full recognition to that remedial character. In addition, I could be persuaded that state procedures and remedies in existence at the time the Act was passed in 1967 were not particularly helpful for the complainant and were procedurally frustrating; that the fact that a federal proceeding supersedes one on the state side indicates which is to be dominant; that ADEA proceedings have their analogy in Fair Labor Standards Act litigation and not in Title VII proceedings; that no waiting period is required before a complainant may resort to a federal remedy (whereas, in striking contrast, under Title VII, state jurisdiction is exclusive for 60 days); that one could reasonably regard the statute as affording a complainant the option of filing either on the state side or on the federal side, and the constraints of § 14 (b) as applicable only if he pursues the state remedy; that it seems so needless to require an untimely state filing that inevitably, and automatically, is to be rejected; that the legislative history of the 1978 amendments, see *ante*, at 758,* while of course not conclusive, might well be regarded, because of its positiveness and clarity, as shedding at least some helpful illumination upon persistent and continuing congressional intent in and since 1967; and that the Government's participation as *amicus curiae* on the side of the respondent also affords some indication of the intended interplay of the federal and state legislation.

The Court acknowledges that the "question of construction is close." *Ante*, at 755. But this is one of those cases that occasionally appears in the procedural area where it is more important that it be decided (in order to dispel existing conflict, see *ante*, at 760–761, and n. 7) than that it be decided correctly.

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*"[A]n individual who has been discriminated against because of age is free to proceed either under state law or under federal law. The choice is up to the individual." S. Rep. No. 95–493, p. 7 (1978), adopted in Joint Explanatory Statement of the Committee of Conference, H. R. Conf. Rep. No. 95–950, pp. 7, 12 (1978).

Inasmuch as I feel that I can live with the Court's decision in this case and that, in the long run, justice will not be denied to anyone possessed of a valid claim, I join the Court's opinion and its judgment.

MR. JUSTICE STEVENS, with whom THE CHIEF JUSTICE, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST join, concurring in part and dissenting in part.

Section 14 (b) of the Age Discrimination in Employment Act of 1967, 81 Stat. 607, 29 U. S. C. § 633 (b), explicitly states that "no suit may be brought" under the Act until the individual has first resorted to appropriate state remedies. Respondent has concededly never resorted to state remedies. In my judgment, this means that his suit should not have been brought and should now be dismissed.

Throughout this litigation both parties have assumed that dismissal would be required if § 14 (b) is construed to mandate individual resort to state remedies in deferral States. In Part II of its opinion, which I join, the Court so construes the statute. However, in Part III of its opinion, the Court volunteers some detailed legal advice about the effect of a suggested course of conduct that respondent may now pursue and then orders that his suit be held in abeyance while he follows that advice.

Regardless of whether the Court's advice is accurate—a question that should not be answered until some litigant has raised it—I am unable to join Part III. If respondent should decide at this point to resort to state remedies, and if his complaint there is found to be time barred, and if he should then seek relief in federal court, the question addressed in Part III of the Court's opinion—whether § 14 (b) requires resort to state remedies "within time limits specified by the State"—would then be presented. But that question is not presented now, and I decline to join or to render an advisory opinion on its merits. I would simply order that this suit be dismissed in accordance with "the mandate of § 14 (b)." *Ante*, at 765.

UNITED STATES *v.* NAFTALIN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 78–561. Argued March 26, 1979—Decided May 21, 1979

Respondent engaged in a fraudulent "short selling" scheme, by placing orders with brokers to sell certain shares of stock which he believed had peaked in price and which he falsely represented that he owned. Gambling that the price would decline substantially before he was required to deliver the securities, he planned to make offsetting purchases through other brokers at lower prices. But the market price rose sharply before the delivery date so that respondent was unable to make covering purchases and never delivered the securities. Consequently, the brokers were unable to deliver the securities to the investor-purchasers and were forced to borrow stock to make the delivery. In order to return the borrowed stock, the brokers had to purchase replacement shares on the open market at the now higher prices, a process known as "buying in." While the investors were thereby shielded from direct injury, the brokers suffered substantial financial losses. The District Court found respondent guilty of employing "a scheme and artifice to defraud" in the sale of securities in violation of § 17 (a)(1) of the Securities Act of 1933, which makes it unlawful "for any person in the offer or sale of any securities . . . directly or indirectly . . . to employ any device, scheme, or artifice to defraud." The Court of Appeals, while finding the evidence sufficient to establish that respondent had committed fraud, vacated the conviction on the ground that the purpose of the Securities Act was to protect investors from fraudulent practices in the sale of securities and that since respondent's fraud injured only brokers and not investors, respondent did not violate § 17 (a)(1).

Held: Section 17 (a)(1) prohibits frauds against brokers as well as investors. Pp. 771–779.

(a) Nothing on the face of § 17 (a)(1) indicates that it applies solely to frauds directed against investors. Rather, its language requires only that the fraud occur "in" an "offer or sale" of securities. Here, an offer and sale clearly occurred within the meaning of the terms as defined in § 2 (3) of the Securities Act. And the fraud occurred "in" the "offer" and "sale," as the statute does not require that the fraud occur in any particular phase of the selling transaction. Pp. 772–773.

(b) The fact that § 17 (a)(3) makes it unlawful for any person in the offer or sale of any securities to engage in any transaction, practice, or course of business which operates as a fraud or deceit "upon the purchaser," does not mean that this latter phrase should be read into § 17 (a)(1), since each subsection of § 17 (a) proscribes a distinct category of misconduct. Pp. 773–774.

(c) Neither this Court nor Congress has ever suggested that investor protection was the *sole* purpose of the Securities Act. While prevention of fraud against investors was a key part of the purpose of the Act, so was the effort "to achieve a high standard of business ethics . . . *in every facet of the securities industry*," *SEC* v. *Capital Gains Bureau*, 375 U. S. 180, 186–187, and this conclusion is amply supported by the legislative history. Pp. 774–776.

(d) Moreover, frauds against brokers may well redound to the detriment of investors. Although the investors in this case suffered no immediate financial injury, the indirect impact upon investors in such a situation can be substantial. And direct injury to investors is also possible. Had the brokers in this case been insolvent or unable to borrow, the investors might have failed to receive their promised shares. Placing brokers outside the aegis of § 17 (a)(1) would create a loophole in the statute that Congress did not intend. Pp. 776–777.

(e) Although the Securities Act was primarily concerned with the regulation of new offerings of securities, the antifraud prohibition of § 17 (a) was meant as a major departure from that limitation, and was intended to cover any fraudulent scheme in an offer or sale of securities, whether in the course of an initial distribution or in the course of ordinary market trading. Accordingly, the fact that respondent's fraud did not involve a new offering does not render § 17 (a)(1) inapplicable to that fraud. Pp. 777–778.

(f) Since the words of § 17 (a)(1) "plainly impose" a penalty for the acts committed in this case, it would be inappropriate to apply the rule that ambiguity as to the scope of a criminal statute should be resolved in favor of lenity. Pp. 778–779.

579 F. 2d 444, reversed.

BRENNAN, J., delivered the opinion of the Court, in which all other Members joined except POWELL, J., who took no part in the consideration or decision of the case.

Stephen M. Shapiro argued the cause for the United States. With him on the briefs were *Solicitor General McCree, Assist-*

ant Attorney General Heymann, Robert J. Erickson, and *David Ferber.*

Joe A. Walters argued the cause and filed a brief for respondent.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question presented in this case is whether § 17 (a)(1) of the Securities Act of 1933, 48 Stat. 84, as amended, 68 Stat. 686, 15 U. S. C. § 77q (a)(1), prohibits frauds against brokers as well as investors. We hold that it does.

Respondent, Neil Naftalin, was the president of a registered broker-dealer firm and a professional investor. Between July and August 1969, Naftalin engaged in a "short selling" scheme. He selected stocks that, in his judgment, had peaked in price and were entering into a period of market decline. He then placed with five brokers orders to sell shares of these stocks, although he did not own the shares he purported to sell. Gambling that the price of the securities would decline substantially before he was required to deliver them, respondent planned to make offsetting purchases through other brokers at lower prices. He intended to take as profit the difference between the price at which he sold and the price at which he covered. Respondent was aware, however, that had the brokers who executed his sell orders known that he did not own the securities, they either would not have accepted the orders, or would have required a margin deposit. He therefore falsely represented that he owned the shares he directed them to sell.[1]

Unfortunately for respondent, the market prices of the securities he "sold" did not fall prior to the delivery date, but instead rose sharply. He was unable to make covering pur-

[1] A broker may mark an order to sell a customer's shares "long" if he "is informed that the seller owns the security ordered to be sold and, as soon as possible without undue inconvenience or expense, will deliver the security . . . ." 17 CFR § 240.10a–1 (d) (1978).

chases, and never delivered the promised securities. Consequently, the five brokers were unable to deliver the stock which they had "sold" to investors, and were forced to borrow stock to keep their delivery promises. Then, in order to return the borrowed stock, the brokers had to purchase replacement shares on the open market at the now higher prices, a process known as "buying in." [2] While the investors to whom the stocks were sold were thereby shielded from direct injury, the five brokers suffered substantial financial losses.

The United States District Court for the District of Minnesota found respondent guilty on eight counts of employing "a scheme and artifice to defraud" in the sale of securities, in violation of § 17 (a)(1).[3] App. 24–25; App. to Pet. for Cert. 15a–20a. Although the Court of Appeals for the Eighth Circuit found the evidence sufficient to establish that respondent had committed fraud, 579 F. 2d 444, 447 (1978), it nonetheless vacated his convictions. Finding that the purpose of the Securities Act "was to protect investors from fraudulent practices in the sale of securities," *ibid.*, the court held that "the government must prove some impact of the scheme on an investor," *id.*, at 448. Since respondent's fraud injured only brokers and not investors, the Court of Appeals concluded that Naftalin did not violate § 17 (a)(1). We granted certiorari, 439 U. S. 1045 (1978), and now reverse.

I

Section 17 (a) of the Securities Act of 1933, subsection (1) of which respondent was found to have violated, states:

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[2] If a broker executes a sell order marked "long" and the seller fails to deliver the securities when due, under certain circumstances the broker must "buy in" substitute securities. See 17 CFR § 240.10a–2 (a) (1978). See also 2 L. Loss, Securities Regulation 1233–1235 (2d ed. 1961) (hereinafter Loss).

[3] Willful violations of § 17 (a) are made subject to criminal sanctions by § 24 of the Securities Act, 15 U. S. C. § 77x.

"It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

"(1) to employ any device, scheme, or artifice to defraud, or

"(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

"(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser."

In this Court, Naftalin does not dispute that, by falsely representing that he owned the stock he sold, he defrauded the brokers who executed his sales. Brief for Respondent 7–8, 11; Tr. of Oral Arg. 17–18. He contends, however, that the Court of Appeals correctly held that § 17 (a)(1) applies solely to frauds directed against investors, and not to those against brokers.

Nothing on the face of the statute supports this reading of it. Subsection (1) makes it unlawful for "any person in the offer or sale of any securities . . . *directly or indirectly* . . . to employ *any* device, scheme, or artifice to defraud . . . ." (Emphasis added.) The statutory language does not require that the victim of the fraud be an investor—only that the fraud occur "in" an offer or sale.

An offer and sale clearly occurred here. Respondent placed sell orders with the brokers; the brokers, acting as agents, executed the orders; and the results were contracts of sale, which are within the statutory definition, 15 U. S. C. § 77b (3).

Moreover, the fraud occurred "in" the "offer" and "sale."[4] The statutory terms, which Congress expressly intended to define broadly, see H. R. Rep. No. 85, 73d Cong., 1st Sess., 11 (1933); 1 Loss 512 n. 163; cf. *SEC* v. *National Securities, Inc.*, 393 U. S. 453, 467 n. 8 (1969), are expansive enough to encompass the entire selling process, including the seller/agent transaction. Section 2 (3) of the Act, 48 Stat. 74, as amended, 68 Stat. 683, 15 U. S. C. § 77b (3), states:

> "The term 'sale' . . . shall include every contract of sale or disposition of a security or interest in a security, for value. The term . . . 'offer' shall include *every attempt* or offer *to dispose of . . . a security* or interest in a security, for value." (Emphasis added.)

This language does not require that the fraud occur in any particular phase of the selling transaction. At the very least, an order to a broker to sell securities is certainly an "attempt to dispose" of them.

Thus, nothing in subsection (1) of § 17 (a) creates a requirement that injury occur to a purchaser. Respondent nonetheless urges that the phrase, "upon the purchaser," found only in subsection (3) of § 17 (a), should be read into all three subsections. The short answer is that Congress did not write the statute that way. Indeed, the fact that it did not provides strong affirmative evidence that while impact upon a purchaser may be relevant to prosecutions brought

[4] Respondent contends that the requirement that the fraud be "in" the offer or sale connotes a narrower range of activities than does the phrase "in connection with," which is found in § 10 (b) of the Securities Exchange Act of 1934, 15 U. S. C. § 78j (b). First, we are not necessarily persuaded that "in" is narrower than "in connection with." Both Congress, see H. R. Rep. No. 85, 73d Cong., 1st Sess., 6 (1933), and this Court, see *Superintendent of Insurance* v. *Bankers Life & Cas. Co.*, 404 U. S. 6, 10 (1971), have on occasion used the terms interchangeably. But even if "in" were meant to connote a narrower group of transactions than "in connection with," there is nothing to indicate that "in" is narrower in the sense insisted upon by Naftalin.

under § 17 (a)(3), it is not required for those brought under § 17 (a)(1). As is indicated by the use of an infinitive to introduce each of the three subsections, and the use of the conjunction "or" at the end of the first two, each subsection proscribes a distinct category of misconduct.[5] Each succeeding prohibition is meant to cover additional kinds of illegalities—not to narrow the reach of the prior sections. See *United States* v. *Birrell*, 266 F. Supp. 539, 542–543 (SDNY 1967). There is, therefore, "no warrant for narrowing alternative provisions which the legislature has adopted with the purpose of affording added safeguards." *United States* v. *Gilliland*, 312 U. S. 86, 93 (1941).[6]

II

The court below placed primary reliance for its restrictive interpretation of § 17 (a)(1) upon what it perceived to be Congress' purpose in passing the Securities Act. Noting that both this Court and Congress have emphasized the importance of the statute in protecting investors from fraudulent practices in the sale of securities, see *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 195 (1976), the Court of Appeals concluded that "against this backdrop . . . we are constrained to hold that

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[5] Moreover, while matters like "punctuation [are] not decisive of the construction of a statute," *Costanzo* v. *Tillinghast*, 287 U. S. 341, 344 (1932), where they reaffirm conclusions drawn from the words themselves they provide useful confirmation. Here the use of separate numbers to introduce each subsection, and the fact that the phrase "upon the purchaser" was set off solely as part of subsection (3), confirm our conclusion that "[n]othing on the face of the statute suggests a congressional intent to limit its coverage," *United States* v. *Culbert*, 435 U. S. 371, 373 (1978), to frauds against purchasers.

[6] This case involves a criminal prosecution. The decision in *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723 (1975), which limited to purchasers or sellers the class of plaintiffs who may have private implied causes of action under Securities and Exchange Commission Rule 10b–5, is therefore inapplicable. See *SEC* v. *National Securities, Inc.*, 393 U. S. 453, 467 n. 9 (1969).

the government must prove some impact of the scheme on an investor." 579 F. 2d, at 448.

But neither this Court nor Congress has ever suggested that investor protection was the *sole* purpose of the Securities Act. As we have noted heretofore, the Act "emerged as part of the aftermath of the market crash in 1929." *Ernst & Ernst* v. *Hochfelder, supra,* at 194. See generally 1 Loss 120–121. Indeed, Congress' primary contemplation was that regulation of the securities markets might help set the economy on the road to recovery. See 77 Cong. Rec. 2925 (1933) (remarks of Rep. Kelly); *id.*, at 2935 (remarks of Rep. Chapman); *id.*, at 3232 (remarks of Sen. Norbeck); H. R. Rep. No. 85, 73d Cong., 1st Sess., 2 (1933). Prevention of frauds against investors was surely a key part of that program, but so was the effort "to achieve a high standard of business ethics . . . *in every facet of the securities industry.*" *SEC* v. *Capital Gains Bureau,* 375 U. S. 180, 186–187 (1963) (emphasis added). See *Ernst & Ernst* v. *Hochfelder, supra,* at 195; *United States* v. *Brown,* 555 F. 2d 336, 338–339 (CA2 1977).

This conclusion is amply supported by reference to the legislative record. The breadth of Congress' purpose is most clearly demonstrated by the Senate Report:

> "The purpose of this bill is to protect the investing public and honest business. . . . The aim is to prevent further exploitation of the public by the sale of unsound, fraudulent, and worthless securities through misrepresentation; to place adequate and true information before the investor; to protect honest enterprise, seeking capital by honest presentation, against the competition afforded by dishonest securities offered to the public through crooked promotion; to restore the confidence of the prospective investor in his ability to select sound securities; to bring into productive channels of industry and development capital which has grown timid to the point of hoarding; and to aid in providing employment and

> restoring buying and consuming power." S. Rep. No. 47, 73d Cong., 1st Sess., 1 (1933).

While investor protection was a constant preoccupation of the legislators, the record is also replete with references to the desire to protect ethical businessmen. See 77 Cong. Rec. 2925 (1933) (remarks of Rep. Kelly); *id.*, at 2983 (remarks of Sen. Fletcher); *id.*, at 3232 (remarks of Sen. Norbeck); S. Rep. No. 47, 73d Cong., 1st Ses., 1 (1933). As Representative Chapman stated, "[t]his legislation is designed to protect not only the investing public but at the same time to protect honest corporate business." 77 Cong. Rec. 2935 (1933). Respondent's assertion that Congress' concern was limited to investors is thus manifestly inconsistent with the legislative history.

Moreover, the welfare of investors and financial intermediaries are inextricably linked—frauds perpetrated upon either business or investors can redound to the detriment of the other and to the economy as a whole. See generally Securities and Exchange Commission, Report of the Special Study of the Securities Markets, H. R. Doc. No. 95, 88th Cong., 1st Sess., pt. 1, pp. 9–11 (1963). Fraudulent short sales are no exception.[7] Although investors suffered no immediate financial injury in this case because the brokers covered the sales by borrowing and then "buying in," the indirect impact upon investors may be substantial. "Buying in" is in actuality only a form of insurance for investors and, like all forms of insurance, has its own costs. Losses suffered by brokers increase their cost of doing business, and in the long run investors pay at least part of this cost through higher brokerage fees. In addition, unchecked short-sale frauds against brokers would create a level of market uncertainty that could only work to the detriment of both investors and the market as a whole. Finally, while the investors here were shielded from direct injury, that may

[7] It bears repeating that respondent was not convicted for short selling, but for *fraudulent* short selling.

not always be the case. Had the brokers been insolvent or unable to borrow, the investors might well have failed to receive their promised shares. Entitled to receive shares at one price under the purchase agreement, they would have had to buy substitute shares in the market at a higher price.[8] Placing brokers outside the aegis of § 17 (a) would create a loophole in the statute that Congress simply did not intend to create.

III

Although the question was not directly presented in the Government's petition for certiorari, respondent asserts a final, independent argument in support of the judgment below. That assertion is that the Securities Act of 1933 was "preoccupied with" the regulation of initial public offerings of securities, and that Congress waited until the Securities Exchange Act of 1934 to regulate abuses in the trading of securities in the "aftermarket." As Naftalin's fraud did not involve a new offering, he contends that § 17 (a) is inapplicable, and that he should have been prosecuted for violations of either the specific short-selling regulations promulgated under the 1934 Act,[9] or for violations of the general antifraud proscriptions of the 1934 Act's § 10b, 15 U. S. C. § 78j (b), and the SEC's Rule 10b–5, 17 CFR § 240.10b–5 (1978). Tr. of Oral Arg. 17–18; Brief for Respondent 16–17, 22–24.

Although it is true that the 1933 Act was primarily con-

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[8] Although this potential for immediate financial injury to investors has been reduced by the "buy in" regulations, see 17 CFR § 240.10a–2 (1978), as well as by the provisions of the Securities Investor Protection Act of 1970, see 15 U. S. C. § 78aaa *et seq.*, the potential for indirect injury, described *supra*, still remains. Moreover, these legal requirements did not exist when the 1933 Act was passed, and hence at that time the kind of fraud practiced by respondent might well have caused investors direct financial injury. The subsequent enactments do not serve to restrict the original scope of § 17 (a).

[9] See 15 U. S. C. §§ 78g, 78j (a); 12 CFR §§ 220.3, 220.4 (c) (ii), 220.8 (d), 224.2 (1978); 17 CFR § 240.10a–1 (1978).

cerned with the regulation of new offerings, respondent's argument fails because the antifraud prohibition of § 17 (a) was meant as a major departure from that limitation. Unlike much of the rest of the Act, it was intended to cover any fraudulent scheme in an offer or sale of securities, whether in the course of an initial distribution or in the course of ordinary market trading. 1 Loss 130; Douglas & Bates, The Federal Securities Act of 1933, 43 Yale L. J. 171, 182 (1933); V. Brudney & M. Chirelstein, Corporate Finance 740 (1972). This is made abundantly clear both by the statutory language, which makes no distinctions between the two kinds of transactions, and by the Senate Report, which stated:

> "The act subjects the sale of old or outstanding securities to the same criminal penalties and injunctive authority for fraud, deception, or misrepresentation as in the case of new issues put out after the approval of the act. In other words, fraud or deception in the sale of securities may be prosecuted regardless of whether the security is old or new, or whether or not it is of the class of securities exempted under sections 11 or 12." S. Rep. No. 47, 73d Cong., 1st Sess., 4 (1933).

Accord, H. R. Rep. No. 85, 73d Cong., 1st Sess., 6 (1933). Respondent is undoubtedly correct that the two Acts prohibit some of the same conduct. See 3 Loss 1428. But "[t]he fact that there may well be some overlap is neither unusual nor unfortunate." *SEC* v. *National Securities, Inc.*, 393 U. S., at 468. See *Edwards* v. *United States*, 312 U. S. 473, 484 (1941). It certainly does not absolve Naftalin of guilt for the transactions which violated the statute under which he was convicted.

IV

This is a criminal case, and we have long held that " 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity,' " *United States* v. *Culbert*, 435 U. S. 371, 379 (1978), quoting *Rewis* v. *United States*, 401

U. S. 808, 812 (1971), and that a defendant may not " 'be subjected to a penalty unless the words of the statute plainly impose it,' " *United States* v. *Campos-Serrano,* 404 U. S. 293, 297 (1971), quoting *Keppel* v. *Tiffin Savings Bank,* 197 U. S. 356, 362 (1905). In this case, however, the words of the statute do "plainly impose it." Here, "Congress has conveyed its purpose clearly, and we decline to manufacture ambiguity where none exists," *United States* v. *Culbert, supra,* at 379. The decision of the Court of Appeals for the Eighth Circuit is

Reversed.

MR. JUSTICE POWELL took no part in the consideration or decision of this case.

UNITED STATES *v.* TIMMRECK

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 78-744. Argued April 16, 1979—Decided May 21, 1979

Respondent was convicted of a federal drug offense upon a guilty plea. Upon accepting the plea the trial judge explained to respondent that he could receive a 15-year prison sentence and a $25,000 fine, but failed to mention a mandatory special parole term of at least 3 years required by the applicable statute. Respondent was then sentenced to 10 years' imprisonment plus a 5-year special parole term, and fined $5,000. Subsequently, respondent moved in District Court to vacate the sentence pursuant to 28 U. S. C. § 2255 on the ground that the trial judge had violated Fed. Rule Crim. Proc. 11 by accepting the guilty plea without informing respondent of the mandatory special parole term. The District Court, while recognizing that a violation of Rule 11 had occurred, held that it did not justify collateral relief under § 2255. The Court of Appeals reversed, holding that a violation of Rule 11 will support a collateral attack on a conviction based on a guilty plea even when there is neither constitutional error nor any showing of special prejudice to the defendant.

Held: A conviction based on a guilty plea is not subject to collateral attack when all that can be shown is a formal violation of Rule 11. Such a violation is neither constitutional nor jurisdictional. Nor can any claim reasonably be made that the error here resulted in a "complete miscarriage of justice" or in a proceeding "inconsistent with the rudimentary demands of fair procedure." *Hill* v. *United States*, 368 U. S. 424, 428. Respondent could have raised his claim on direct appeal but did not, and there is no basis here for allowing collateral attack to do service for an appeal. Pp. 783–785.

577 F. 2d 372, reversed.

STEVENS, J., delivered the opinion for a unanimous Court.

Kenneth S. Geller argued the cause for the United States. With him on the brief were *Solicitor General McCree* and *Assistant Attorney General Heymann.*

Kenneth M. Mogill argued the cause and filed a brief for respondent.

MR. JUSTICE STEVENS delivered the opinion of the Court.

The question presented is whether a conviction based on a guilty plea is subject to collateral attack whenever it can be shown that Rule 11 of the Federal Rules of Criminal Procedure was violated when the plea was accepted.

In this case, acting on the advice of counsel, respondent pleaded guilty to a charge of conspiracy to distribute various controlled substances. As required by Rule 11,[1] the District Judge formally addressed respondent and determined that

[1] At the time of respondent's guilty plea, Rule 11 provided:

"A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea."

Rule 11 now provides in pertinent part:

"Advice to Defendant.

"Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:

"(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and

"(2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent him; and

"(3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and

"(4) that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and

"(5) that if he pleads guilty or nolo contendere, the court may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement."

there was a factual basis for the plea and that he was acting voluntarily. The judge explained that respondent could receive a sentence of 15 years' imprisonment and a $25,000 fine, but the judge failed to describe the mandatory special parole term of at least 3 years required by the applicable statute.[2]

The District Judge accepted the guilty plea and, at a later proceeding, sentenced respondent to 10 years' imprisonment plus a special parole term of 5 years, and a fine of $5,000. Pursuant to a plea bargain with the prosecutor, other charges against respondent were dismissed. No objection to the sentence was raised at the time, and respondent did not take an appeal from his conviction.

About two years later, respondent moved to vacate the sentence pursuant to 28 U. S. C. § 2255 [3] on the ground that the trial judge had violated Rule 11 by accepting his plea without informing him of the mandatory special parole term. The District Court held an evidentiary hearing, at which respondent's lawyer testified that it was his normal practice to inform his clients about the mandatory special parole term but that he could not recall whether or not he had given such advice to this defendant. Following this hearing, the District Court denied the motion. The court recognized that a violation of Rule 11 had occurred, but concluded that it did not justify collateral relief under § 2255 because re-

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[2] 21 U. S. C. § 841 (b)(1)(A).

[3] Title 28 U. S. C. § 2255 provides in pertinent part:

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence."

spondent had not suffered any prejudice inasmuch as he had received a sentence within the maximum described to him at the time the guilty plea was accepted.

The Court of Appeals reversed. 577 F. 2d 372. It held that a violation of Rule 11 will support a collateral attack on a conviction based on a guilty plea even when there is neither constitutional error nor any showing of special prejudice to the defendant. Because of the importance of that holding to the administration of justice, we granted certiorari, 439 U. S. 1065, and now reverse.

In *Hill* v. *United States*, 368 U. S. 424, the Court was presented with the question whether a collateral attack under § 2255 could be predicated on a violation of Fed. Rule Crim. Proc. 32 (a), which gives the defendant the right to make a statement on his own behalf before he is sentenced. The Court rejected the claim, stating:

> "The failure of a trial court to ask a defendant represented by an attorney whether he has anything to say before sentence is imposed is not of itself an error of the character or magnitude cognizable under a writ of habeas corpus. It is an error which is neither jurisdictional nor constitutional. It is not a fundamental defect which inherently results in a complete miscarriage of justice, nor an omission inconsistent with the rudimentary demands of fair procedure. It does not present 'exceptional circumstances where the need for the remedy afforded by the writ of *habeas corpus* is apparent.' *Bowen* v. *Johnston*, 306 U. S. 19, 27. See *Escoe* v. *Zerbst*, 295 U. S. 490; *Johnson* v. *Zerbst*, 304 U. S. 458; *Walker* v. *Johnston*, 312 U. S. 275; *Waley* v. *Johnston*, 316 U. S. 101." 368 U. S., at 428.

The reasoning in *Hill* is equally applicable to a formal violation of Rule 11. Such a violation is neither constitutional nor jurisdictional: the 1966 amendment to Rule 11

obviously could not amend the Constitution or limit the jurisdiction of the federal courts. Nor can any claim reasonably be made that the error here resulted in a "complete miscarriage of justice" or in a proceeding "inconsistent with the rudimentary demands of fair procedure." Respondent does not argue that he was actually unaware of the special parole term or that, if he had been properly advised by the trial judge, he would not have pleaded guilty. His only claim is of a technical violation of the Rule. That claim could have been raised on direct appeal, see *McCarthy* v. *United States*, 394 U. S. 459, but was not. And there is no basis here for allowing collateral attack "to do service for an appeal." *Sunal* v. *Large*, 332 U. S. 174, 178.

Indeed, if anything, this case may be a stronger one for foreclosing collateral relief than the *Hill* case. For the concern with finality served by the limitation on collateral attack [4] has special force with respect to convictions based on guilty pleas.

> "Every inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice. The impact is greatest when new grounds for setting aside guilty pleas are approved because the vast majority of criminal convictions result from such pleas. Moreover, the concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea." *United States* v. *Smith*, 440 F. 2d 521, 528–529 (Stevens, J., dissenting).

As in *Hill*, we find it unnecessary to consider whether § 2255 relief would be available if a violation of Rule 11 occurred in

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[4] See *Stone* v. *Powell*, 428 U. S. 465, 491, and n. 31; *Henderson* v. *Kibbe*, 431 U. S. 145, 154 n. 13.

the context of other aggravating circumstances. "We decide only that such collateral relief is not available when all that is shown is a failure to comply with the formal requirements of the Rule." 368 U. S., at 429.

The judgment of the Court of Appeals is

Reversed.

KENTUCKY *v.* WHORTON

CERTIORARI TO THE SUPREME COURT OF KENTUCKY

No. 78–749. Argued April 16, 1979—Decided May 21, 1979

Upon trial in a Kentucky state court, respondent was convicted of several offenses. The trial court refused to give respondent's requested jury instruction on the presumption of innocence, but did give an instruction to the effect that the jury could return a guilty verdict only if they found beyond a reasonable doubt that respondent had committed the acts charged with the requisite criminal intent. Relying on its understanding of *Taylor* v. *Kentucky*, 436 U. S. 478—where this Court reversed a conviction resulting from a trial in which the judge had refused to give a requested instruction on the presumption of innocence—the Kentucky Supreme Court held that such an instruction is constitutionally required in all criminal trials, and that the failure of a trial judge to give it cannot be harmless error.

Held: The Kentucky Supreme Court erred in interpreting *Taylor*, *supra*, as holding that the Due Process Clause of the Fourteenth Amendment absolutely requires that an instruction on the presumption of innocence must be given in every criminal case. The failure to give such an instruction when requested does not in and of itself violate the Constitution. Under *Taylor*, such a failure must be evaluated in light of the totality of the circumstances—including all the instructions, the arguments of counsel, whether the weight of the evidence was overwhelming, and other relevant factors—to determine whether the defendant received a constitutionally fair trial.

570 S. W. 2d 627, reversed and remanded.

Patrick B. Kimberlin III, Assistant Attorney General of Kentucky, argued the cause for petitioner. With him on the briefs was *Robert F. Stephens*, Attorney General.

Terrence R. Fitzgerald argued the cause for respondent. With him on the brief was *Paul G. Tobin*.

PER CURIAM.

In *Taylor* v. *Kentucky*, 436 U. S. 478 (1978), this Court reversed a criminal conviction resulting from a trial in which the judge had refused to give a requested jury instruction on

the presumption of innocence. Relying on its understanding of that decision, the Kentucky Supreme Court in the present case held that such an instruction is constitutionally required in all criminal trials, and that the failure of a trial judge to give it cannot be harmless error. 570 S. W. 2d 627. We granted certiorari to consider whether the Kentucky Supreme Court correctly interpreted our holding in *Taylor*. 439 U. S. 1067.

I

The respondent was charged in three separate indictments with the commission of several armed robberies. At trial, numerous eyewitnesses identified the respondent as the perpetrator. Weapons, stolen money, and other incriminating evidence found in the respondent's automobile were introduced in evidence. The respondent did not take the stand in his own defense. The only evidence on his behalf was given by his wife and sister who offered alibi testimony concerning his whereabouts during the time of the commission of one of the robberies.

The respondent's counsel requested that the jury be instructed on the presumption of innocence.[1] This instruction was refused by the trial judge. An instruction was given, however, to the effect that the jury could return a verdict of guilty only if they found beyond a reasonable doubt that the respondent had committed the acts charged in the indictment with the requisite criminal intent.

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[1] The respondent's lawyer made a timely request that the following instruction be given:

"The law presumes an accused to be innocent of crime. He begins the trial with a clean slate, with no evidence against him. And the law permits nothing but legal evidence presented before the jury to be considered in support of any charge against the accused. So the presumption of innocence alone is sufficient to acquit an accused unless the jury members are satisfied beyond a reasonable doubt of the accused's guilt from all the evidence in the case."

The jury found the respondent guilty of 10 counts of first-degree robbery, 2 counts of first-degree wanton endangerment, and 2 counts of first-degree attempted robbery. The respondent was sentenced to consecutive terms of imprisonment totaling 230 years.

On appeal, the respondent argued that he had been denied due process of law in violation of the Fourteenth Amendment by reason of the trial judge's refusal to give an instruction on the presumption of innocence. A divided Kentucky Supreme Court agreed, interpreting this Court's decision in *Taylor* "to mean that when an instruction on the presumption of innocence is asked for and denied there is a reversible error." 570 S. W. 2d, at 633.[2]

Two justices filed separate dissenting opinions. In their view, the *Taylor* case should be understood as dealing with the factual situation there presented, and not as establishing a constitutional rule that failure to instruct the jury on the presumption of innocence requires automatic reversal of a conviction. Since these justices concluded that the respondent received a fair trial, they would have affirmed the convictions.

II

While this Court in *Taylor* reversed a conviction resulting from a trial in which the judge had refused to give a requested instruction on the presumption of innocence, the Court did not there fashion a new rule of constitutional law requiring that such an instruction be given in every criminal case. Rather, the Court's opinion focused on the failure to give the instruction as it related to the overall fairness of the trial considered in its entirety.

The Court observed, for example, that the trial judge's instructions were "Spartan," 436 U. S., at 486, that the prosecutor improperly referred to the indictment and otherwise

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[2] The wanton endangerment convictions were reversed on state-law grounds not relevant here.

made remarks of dubious propriety, *id.*, at 486–488, and that the evidence against the defendant was weak. *Id.*, at 488. "[T]he combination of the skeletal instructions, the possible harmful inferences from the references to the indictment, and the repeated suggestions that petitioner's status as a defendant tended to establish his guilt created a genuine danger that the jury would convict petitioner on the basis of those extraneous considerations, rather than on the evidence introduced at trial." *Id.*, at 487–488.

It was under these circumstances that the Court held that the failure of the trial court to instruct the jury on the presumption of innocence denied the defendant due process of law. Indeed, the Court's holding was expressly limited to the facts: "We hold that *on the facts of this case* the trial court's refusal to give petitioner's requested instruction on the presumption of innocence resulted in a violation of his right to a fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment." *Id.*, at 490 (emphasis added). This explicitly limited holding, and the Court's detailed discussion of the circumstances of the defendant's trial, belie any intention to create a rule that an instruction on the presumption of innocence is constitutionally required in every case.

In short, the failure to give a requested instruction on the presumption of innocence does not in and of itself violate the Constitution. Under *Taylor*, such a failure must be evaluated in light of the totality of the circumstances—including all the instructions to the jury, the arguments of counsel, whether the weight of the evidence was overwhelming, and other relevant factors—to determine whether the defendant received a constitutionally fair trial.

The Kentucky Supreme Court thus erred in interpreting *Taylor* to hold that the Due Process Clause of the Fourteenth Amendment absolutely requires that an instruction on the presumption of innocence must be given in every criminal

case. The court's inquiry should have been directed to a determination of whether the failure to give such an instruction in the present case deprived the respondent of due process of law in light of the totality of the circumstances.

Accordingly, the judgment is reversed, and the case is remanded to the Supreme Court of Kentucky for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE STEWART, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

No principle is more firmly established in our system of criminal justice than the presumption of innocence that is accorded to the defendant in every criminal trial. In *In re Winship,* 397 U. S. 358, the Court held that the Due Process Clause of the Fourteenth Amendment requires proof beyond a reasonable doubt of a defendant's guilt. I believe that the Due Process Clause of the Fourteenth Amendment equally requires the presumption that a defendant is innocent until he has been proved guilty.

Almost 85 years ago, the Court said: "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Coffin* v. *United States,* 156 U. S. 432, 453. Only three years ago the Court reaffirmed that the presumption of innocence "is a basic component of a fair trial under our system of criminal justice." *Estelle* v. *Williams,* 425 U. S. 501, 503. See also *Cool* v. *United States,* 409 U. S. 100, 104. And a fair trial, after all, is what the Due Process Clause of the Fourteenth Amendment above all else guarantees.

While an instruction on the presumption of innocence in one sense only serves to remind the jury that the prosecutor has the burden of proof beyond a reasonable doubt, it also has

a separate and distinct function. Quite apart from considerations of the burden of proof, the presumption of innocence "cautions the jury to put away from their minds all the suspicion that arises from the arrest, the indictment, and the arraignment, and to reach their conclusion solely from the legal evidence adduced." 9 J. Wigmore, Evidence § 2511, p. 407 (3d ed. 1940). And because every defendant, regardless of the totality of the circumstances, is entitled to have his guilt determined only on the basis of the evidence properly introduced against him at trial, I would hold that an instruction on the presumption of innocence is constitutionally required in every case where a timely request has been made.[1]

There may be cases where the failure to give such an instruction could not have affected the outcome of the trial. If that conclusion can be drawn beyond a reasonable doubt, failure to give the instruction would be harmless error. Cf. *Chapman* v. *California*, 386 U. S. 18; *Harrington* v. *California*, 395 U. S. 250. Since the Kentucky Supreme Court did not consider this possibility, I would vacate its judgment and remand the case to that court, but only for consideration of whether the failure to give the instruction in the circumstances presented here was harmless error.[2]

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[1] At least one Member of the Court understood our opinion in *Taylor* v. *Kentucky*, 436 U. S. 478 to hold precisely that. See *id.*, at 490 (BRENNAN, J., concurring).

[2] On remand, the Kentucky court would of course be free to hold as a matter of state law that it would not consider the question of harmless error in this context. See *Watson* v. *Commonwealth*, 579 S. W. 2d 103 (Ky.).

CONNOR ET AL. *v.* COLEMAN, JUDGE, UNITED STATES COURT OF APPEALS, ET AL.

ON PETITION FOR WRIT OF MANDAMUS

No. 78–1013. Decided May 21, 1979

A petition for writ of mandamus to require the District Court to adopt a reapportionment plan for the Mississippi Legislature is denied, where after this Court granted leave to file the petition the District Court entered a final judgment specifying a plan for reapportionment, and the parties announced that there will be no appeal.

PER CURIAM.

On March 26, 1979, we granted leave to petitioners to file a petition for a writ of mandamus to require the United States District Court for the Southern District of Mississippi to adopt a plan for the reapportionment of the Mississippi Legislature. 440 U. S. 612. The order granting leave recited that we continued for 30 days our consideration of the petition.

The Clerk of the District Court has now formally advised the Clerk of this Court that on April 13, 1979, the District Court entered a final judgment specifying a court-ordered plan for the reapportionment of the legislature and for elections to be conducted in the coming summer. The District Court Clerk has also stated that all parties to the litigation have announced in open court that there will be no appeal.

The petition for a writ of mandamus is therefore denied.

So ordered.

MR. JUSTICE POWELL took no part in the decision on this petition.

Reporter's Note

The next page is purposely numbered 901. The numbers between 792 and 901 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FROM APRIL 16 THROUGH MAY 21, 1979

APRIL 16, 1979*

Dismissal Under Rule 60

No. 78–1073. HENNESSY ET UX. *v.* HENNESSY ET AL. C. A. 7th Cir. Certiorari dismissed under this Court's Rule 60. Reported below: 582 F. 2d 1284.

Vacated and Remanded on Appeal

No. 78–1071. HUGHES *v.* HUGHES. Appeal from Sup. Ct. Ala. Judgment vacated and case remanded for further consideration in light of *Orr* v. *Orr*, 440 U. S. 268 (1979). Reported below: 362 So. 2d 918.

Appeal Dismissed

No. 78–1451. MCCOY ET AL. *v.* CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL. Appeal from C. A. 7th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 588 F. 2d 834.

Certiorari Granted—Vacated and Remanded

No. 77–1611. HERCOFORM, INC. *v.* CHICAGO TITLE INSURANCE CO. ET AL. C. A. 1st Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Kimbell Foods, Inc.*, 440 U. S. 715 (1979). Reported below: 568 F. 2d 217.

No. 78–5995. HUNT *v.* MISSOURI. Ct. App. Mo., Kansas City Dist. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Duren* v. *Mis-*

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*MR. JUSTICE POWELL took no part in the consideration or decision of cases in which orders hereinafter reported were announced on this date.

souri, 439 U. S. 357 (1979). Reported below: 570 S. W. 2d 777.

No. 78–6077. JONES *v.* MISSOURI. Ct. App. Mo., Kansas City Dist. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Duren* v. *Missouri,* 439 U. S. 357 (1979). Reported below: 571 S. W. 2d 741.

Miscellaneous Orders

No. A–835. UNITED STEELWORKERS OF AMERICA, AFL–CIO–CLC *v.* SOLIEN, REGIONAL DIRECTOR, NATIONAL LABOR RELATIONS BOARD, ET AL. C. A. 8th Cir. Application for stay, addressed to MR. JUSTICE BRENNAN and referred to the Court, denied.

No. 80, Orig. COLORADO *v.* NEW MEXICO ET AL. It is ordered that the Honorable Ewing I. Kerr, Senior Judge for the United States District Court for the District of Wyoming, be appointed Special Master in this case with authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem necessary to call for. The Master is directed to submit such reports as he may deem appropriate.

The Master shall be allowed his actual expenses. The allowances to him, the compensation paid to his technical, stenographic, and clerical assistants, the cost of printing his report, and all other proper expenses shall be charged against and be borne by the parties in such proportion as the Court may hereafter direct.

It is further ordered that if the position of Special Master in this case becomes vacant during a recess of the Court, THE CHIEF JUSTICE shall have authority to make a new designation which shall have the same effect as if originally made by the Court. [For earlier order herein, see 439 U. S. 975.]

No. 78–599. SECRETARY OF THE NAVY ET AL. *v.* HUFF ET AL. C. A. D. C. Cir. [Certiorari granted, 440 U. S. 957]; and

No. 78–1006. BROWN, SECRETARY OF DEFENSE, ET AL. *v.* GLINES. C. A. 9th Cir. [Certiorari granted, 440 U. S. 957.] Motion of the Solicitor General to consolidate these cases for briefing and oral argument denied.

No. 78–605. UNITED STATES ET AL. *v.* RUTHERFORD ET AL. C. A. 10th Cir. [Certiorari granted, 439 U. S. 1127.] Motion of Save the United States Movement, Improving Public Health and Physical Fitness of the United States Citizens, for leave to participate in oral argument as *amicus curiae* denied.

No. 78–610. COLUMBUS BOARD OF EDUCATION ET AL. *v.* PENICK ET AL. C. A. 6th Cir. [Certiorari granted, 439 U. S. 1066.] Motion of Cleveland Board of Education for leave to file a brief as *amicus curiae* denied. Motion of the Solicitor General for divided argument as *amicus curiae* granted.

No. 78–627. DAYTON BOARD OF EDUCATION ET AL. *v.* BRINKMAN ET AL. C. A. 6th Cir. [Certiorari granted, 439 U. S. 1066.] Motion of Cleveland Board of Education for leave to file a brief as *amicus curiae* denied. Motion of the Solicitor General for divided argument as *amicus curiae* granted.

No. 78–776. UNITED STATES *v.* BATCHELDER. C. A. 7th Cir. [Certiorari granted, 439 U. S. 1066.] Motion of the Solicitor General to permit Andrew J. Levander, Esquire, to present oral argument *pro hac vice* granted.

No. 78–1309. PIOCHE MINES CONSOLIDATED, INC. *v.* FIDELITY PHILADELPHIA TRUST CO. Motion for leave to file petition for writ of certiorari and/or mandamus denied.

No. 78–6229. JOHNSON *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN. Motion for leave to file petition for writ of mandamus and/or prohibition denied.

No. 78–6281. GREEN *v.* CLARK, U. S. DISTRICT JUDGE, ET AL. Motion for leave to file petition for writ of mandamus denied.

Certiorari Granted

No. 78–756. OHIO *v.* ROBERTS. Sup. Ct. Ohio. Certiorari granted. Reported below: 55 Ohio St. 2d 191, 378 N. E. 2d 492.

No. 78–1318. O'BANNON, SECRETARY OF PUBLIC WELFARE OF PENNSYLVANIA *v.* TOWN COURT NURSING CENTER ET AL. C. A. 3d Cir. Certiorari granted. Reported below: 586 F. 2d 280.

No. 78–1323. NORFOLK & WESTERN RAILWAY CO. *v.* LIEPELT, ADMINISTRATRIX. App. Ct. Ill., 1st Dist. Certiorari granted. Reported below: 62 Ill. App. 3d 653, 378 N. E. 2d 1232.

No. 78–1088. KISSINGER *v.* REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS ET AL.; and

No. 78–1217. REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS ET AL. *v.* KISSINGER. C. A. D. C. Cir. Certiorari granted. Reported below: 191 U. S. App. D. C. 213, 589 F. 2d 1116.

No. 78–5471. WHALEN *v.* UNITED STATES; and PYNES *v.* UNITED STATES. Ct. App. D. C. Motion of Thomas W. Whalen for leave to proceed *in forma pauperis* granted. Certiorari granted in *Whalen* v. *United States*. Reported below: 379 A. 2d 1152 (first case); 385 A. 2d 772 (second case).

Certiorari Denied. (See also No. 78–1451, *supra*.)

No. 77–1835. NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS *v.* BROOKHAVEN CABLE TV, INC., ET AL.; and

No. 77–1845. KELLY ET AL. *v.* BROOKHAVEN CABLE TV, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 573 F. 2d 765.

No. 78–1033. SOUTHLAND ROYALTY CO. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 217 Ct. Cl. 431, 582 F. 2d 604.

No. 78–1052. BUNDY ET AL. *v.* RUDD ET AL., JUDGES. Cir. Ct. Fla., Leon County. Certiorari denied.

No. 78–1080. LOVELESS *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 39 Md. App. 563, 387 A. 2d 311.

No. 78–1093. BUNDY ET AL. *v.* RUDD, JUDGE, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 581 F. 2d 1126.

No. 78–1128. PODELL *v.* JOINT BAR ASSOCIATION GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 61 App. Div. 2d 1019, 403 N. Y. S. 2d 52.

No. 78–1129. BRASCO *v.* JOINT BAR ASSOCIATION GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 62 App. Div. 2d 1006, 406 N. Y. S. 2d 1002.

No. 78–1152. VERGARA ET AL. *v.* CHAIRMAN, MERIT SYSTEMS PROTECTION BOARD, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 581 F. 2d 1281.

No. 78–1164. HOLLAND *v.* SEABOARD COAST LINE RAILROAD CO. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 353 So. 2d 618.

No. 78–1167. GIBSON *v.* DAVIS, DIRECTOR, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 587 F. 2d 280.

No. 78–1174. TAXATION WITH REPRESENTATION *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 585 F. 2d 1219.

No. 78–1190. WALKER *v.* NEWGENT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 583 F. 2d 163.

No. 78–1192. GINSBURG, FELDMAN & BRESS *v.* DEPARTMENT OF ENERGY. C. A. D. C. Cir. Certiorari denied. Reported below: 192 U. S. App. D. C. 108, 591 F. 2d 717.

No. 78–1200. SANTOS ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 588 F. 2d 1300.

No. 78–1204. HONICKER *v.* NUCLEAR REGULATORY COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 192 U. S. App. D. C. 91, 590 F. 2d 1207.

No. 78–1210. MOENCKMEIER ET UX. *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 585 F. 2d 519.

No. 78–1229. A–OK MOTOR LINES, INC. (KAUFMAN, TRUSTEE IN BANKRUPTCY) *v.* NORTH ALABAMA EXPRESS, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 576 F. 2d 679 and 583 F. 2d 779.

No. 78–1230. MORELOCK ET AL. *v.* NCR CORP. C. A. 6th Cir. Certiorari denied. Reported below: 586 F. 2d 1096.

No. 78–1240. JOHNSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 78–1264. HENDERSON ET AL. *v.* FORT WORTH INDEPENDENT SCHOOL DISTRICT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 584 F. 2d 115.

No. 78–1266. MATHIAS *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 284 Md. 22, 394 A. 2d 292.

No. 78–1274. THOMPSON *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 364 So. 2d 683.

No. 78–1276. KAPP *v.* NATIONAL FOOTBALL LEAGUE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 586 F. 2d 644.

No. 78–1277. GOLDING *v.* CITY COUNCIL OF THE CITY OF RICHMOND ET AL. Sup. Ct. Va. Certiorari denied.

No. 78–1281. IOWA BEEF PROCESSORS, INC. *v.* SMITH. C. A. 8th Cir. Certiorari denied. Reported below: 588 F. 2d 638.

No. 78–1283. BROTHERHOOD OF RAILWAY, AIRLINE & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS & STATION EMPLOYEES, ET AL. *v.* KANSAS CITY TERMINAL RAILWAY CO. C. A. 8th Cir. Certiorari denied. Reported below: 587 F. 2d 903.

No. 78–1289. GODWIN *v.* MARYLAND. Ct. App. Md. Certiorari denied.

No. 78–1291. VAN GORDON *v.* OREGON STATE BOARD OF DENTAL EXAMINERS ET AL. Ct. App. Ore. Certiorari denied. Reported below: 34 Ore. App. 607, 579 P. 2d 306.

No. 78–1293. STEWART *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 66 Ill. App. 3d 342, 383 N. E. 2d 1179.

No. 78–1297. WINE *v.* INDIANA. Ct. App. Ind. Certiorari denied.

No. 78–1301. HICKEL ET AL. *v.* THOMAS, LT. GOVERNOR OF ALASKA, ET AL. Sup. Ct. Alaska. Certiorari denied. Reported below: 588 P. 2d 256.

No. 78–1304. AMERICAN SEATING CO. *v.* NATIONAL SEATING CO. C. A. 6th Cir. Certiorari denied. Reported below: 586 F. 2d 611.

No. 78–1305. BLEA *v.* NEW MEXICO. Ct. App. N. M. Certiorari denied. Reported below: 92 N. M. 269, 587 P. 2d 47.

No. 78–1312. SMITH *v.* COUNTY OF YORK. Pa. Commw. Ct. Certiorari denied. Reported below: 37 Pa. Commw. 47, 388 A. 2d 1149.

No. 78–1315. MOTOWN RECORD CORP. *v.* SOLINGER; and
No. 78–1317. A&M RECORDS, INC., ET AL *v.* SOLINGER. C. A. 9th Cir. Certiorari denied. Reported below: 586 F. 2d 1304.

No. 78–1321. A. T. CROSS CO. *v.* QUILL CO., INC. C. A. 1st Cir. Certiorari denied. Reported below: 587 F. 2d 533.

No. 78–1322. PITTWAY CORP. *v.* BURKE ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 63 Ill. App. 3d 354, 380 N. E. 2d 1.

No. 78–1355. HARCO PRODUCTS, INC., DBA DFC CO. *v.* REX CHAINBELT, INC. C. A. 9th Cir. Certiorari denied.

No. 78–1378. VAICEKAUSKAS *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 7th Cir. Certiorari denied. Reported below: 588 F. 2d 837.

No. 78–1416. CARTER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 590 F. 2d 138.

No. 78–1421. CARTER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 592 F. 2d 402.

No. 78–1426. PACELLI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 588 F. 2d 360.

No. 78–1432. THOMPSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 78–5916. VEAL *v.* ILLINOIS; and
No. 78–5917. KNIGHTS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 58 Ill. App. 3d 938, 374 N. E. 2d 963.

No. 78–5922. RIGGSBEE *v.* ROMERO, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 78–5967. MCLAIN *v.* MORRIS, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 588 F. 2d 840.

No. 78–5985. HERRERA *v.* NEW MEXICO. Sup. Ct. N. M. Certiorari denied. Reported below: 92 N. M. 180, 585 P. 2d 324.

No. 78–6000. ZEPEDA *v.* STAHL, SHERIFF. C. A. 4th Cir. Certiorari denied. Reported below: 588 F. 2d 1354.

No. 78–6005. WASHINGTON *v.* CUPP, PENITENTIARY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied. Reported below: 586 F. 2d 134.

No. 78–6011. SNEAD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 577 F. 2d 730 and 586 F. 2d 836.

No. 78–6030. MOORE *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 78–6068. LANDRUM *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 585 F. 2d 519.

No. 78–6069. CASSASA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 588 F. 2d 282.

No. 78–6071. ROBERTS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 594 F. 2d 853.

No. 78–6087. PAUL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 78–6093. MASON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 588 F. 2d 1352.

No. 78–6107. COLE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 588 F. 2d 56.

No. 78–6118. YOUNGE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 588 F. 2d 568 and 834.

No. 78–6120. TEMPESTA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 587 F. 2d 931.

No. 78–6126. BENNING *v.* TAULBORG BROTHERS BUILDERS. C. A. 8th Cir. Certiorari denied. Reported below: 590 F. 2d 340.

No. 78–6139. HAWKINS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 193 U. S. App. D. C. 366, 595 F. 2d 751.

No. 78–6141. LYON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 588 F. 2d 581.

No. 78–6173. ROBERTSON *v.* NEW YORK. App. Term, Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 78–6182. SMITH *v.* SMITH. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 78–6206. MUNDY *v.* DIRECTOR, DEPARTMENT OF CORRECTIONS, TAZEWELL, VIRGINIA. C. A. 4th Cir. Certiorari denied. Reported below: 588 F. 2d 1350.

No. 78–6211. REYNOLDS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 78–6212. LESLIE *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 376 Mass. 647, 382 N. E. 2d 1072.

No. 78–6213. KESSLER *v.* NEW YORK ET AL. C. A. 2d Cir. Certiorari denied.

No. 78–6228. KUMAR *v.* OHIO. Ct. App. Ohio, Marion County. Certiorari denied.

No. 78–6230. MONROE *v.* BROWN. C. A. 1st Cir. Certiorari denied.

No. 78–6231. WEDDINGTON *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 146 Ga. App. 662, 247 S. E. 2d 190.

No. 78–6233. SOLBERG *v.* HENDERSON, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 584 F. 2d 974.

No. 78–6241. LYON *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 78–6242. GREEN *v.* CRANE. Sup. Ct. Miss. Certiorari denied. Reported below: 364 So. 2d 1117.

No. 78–6252. SAWAYA *v.* BERNALILLO COUNTY ASSESSOR. Sup. Ct. N. M. Certiorari denied. Reported below: 92 N. M. 353, 588 P. 2d 554.

No. 78–6254. BANKS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 63 Ill. App. 3d 891, 380 N. E. 2d 903.

No. 78–6259. HAMPEL *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 78–6267. MILLIGAN *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 256 Pa. Super. 611, 389 A. 2d 682.

No. 78–6268. SALLIE *v.* NORTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 587 F. 2d 636.

No. 78–6269. STUART *v.* GAMWELL. Ct. App. Ga. Certiorari denied.

No. 78–6273. WILLIAMS *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied.

No. 78–6274. SANCHEZ *v.* DALLAS MORNING NEWS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 584 F. 2d 388.

No. 78–6278. GREEN *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 78–6279. CREQUE *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 72 Ill. 2d 515, 382 N. E. 2d 793.

No. 78–6285. HARRISON *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 269 Ind. 677, 382 N. E. 2d 920.

No. 78–6289. CZORNONOH *v.* UNITED STATES SECRET SERVICE; and CZORNONOH *v.* STALLARD ET AL. C. A. 9th Cir. Certiorari denied.

No. 78–6339. GOODLOE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 595 F. 2d 1226.

No. 78–6347. CACY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 588 F. 2d 827.

No. 78–6348. GORDON *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 592 F. 2d 1215.

No. 78–6355. ALONZO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 590 F. 2d 332.

No. 78–6364. SMITH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 594 F. 2d 243.

No. 78–6370. MARTIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 78–6373. DAVIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 595 F. 2d 1226.

No. 78–6377. JACKSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 590 F. 2d 121.

No. 78–6389. POWELL *v.* FARRELL, CONTROLLER OF THE CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari before judgment denied.

No. 78–6390. LEFTON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 590 F. 2d 337.

No. 78–6399. GREENE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 590 F. 2d 341.

No. 78–6402. FRICK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 588 F. 2d 531.

No. 78–1018. FIGGINS ET AL. *v.* HUDSPETH. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 584 F. 2d 1345.

No. 78–1099. MARQUEZ, CORRECTIONAL SUPERINTENDENT *v.* BITTAKER. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 587 F. 2d 400.

No. 78–1103. PENNSYLVANIA *v.* RITTER. Sup. Ct. Pa. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 481 Pa. 177, 392 A. 2d 305.

No. 78–1098. HERMAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 589 F. 2d 1191.

No. 78–1290. GOLDSTEIN *v.* CITY OF NORFOLK. Sup. Ct. Va. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL would grant certiorari and reverse the conviction.

No. 78–5873. IRVING *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 361 So. 2d 1360.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

I adhere to my view that the death penalty is unconstitutional under all circumstances. *Furman* v. *Georgia*, 408 U. S.

238, 314 (1972) (MARSHALL, J., concurring); *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting). I would therefore grant certiorari and vacate the death sentence on this basis alone. However, because the Mississippi Supreme Court's ruling on an issue of joint representation appears inconsistent with this Court's prior decisions, I believe certiorari should be granted on that ground as well.

Petitioner John Irving was indicted in Pontotoc County, Miss., on July 7, 1976, for capital murder. Both petitioner and a separately indicted accomplice, Keith Givhan, retained the same counsel. On November 8, 1976, the day before petitioner's trial, his attorney filed a motion to withdraw because of a conflict of interest. Counsel did, however, express his willingness to continue representing Givhan, whose trial was scheduled for the following week. After a hearing, the Circuit Court denied the motion and petitioner's case proceeded to trial. A jury found petitioner guilty as charged and sentenced him to death. The Mississippi Supreme Court affirmed. 361 So. 2d. 1360 (1978).

In the affidavit supporting his motion to withdraw, petitioner's counsel identified several potential sources of conflict. Each defendant had given an inculpatory statement implicating the other. Also, during the period of pretrial incarceration, each had developed inconsistent theories of defense. Finally, plea negotiations with the local district and county attorneys had raised the possibility of a bargain in one case but not the other. Under those circumstances, counsel averred that he could not, based on his "reading of *Glasser* [v. *United States*, 315 U. S. 60 (1942),] advise either defendant . . . as to what posture [he] should assume." Record 53.

In *Glasser*, this Court stated: "[T]he 'assistance of counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests." 315 U. S., at 70. Just last Term, in

Holloway v. *Arkansas*, 435 U. S. 475 (1978), we reaffirmed that principle and noted:

> "[S]ince the decision in *Glasser*, most courts have held that an attorney's request for the appointment of separate counsel, based on his representations as an officer of the court regarding a conflict of interests, should be granted. . . . An 'attorney representing two defendants in a criminal matter is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial.' *State* v. *Davis*, [110 Ariz. 29, 31, 514 P. 2d 1025, 1027 (1973)]. . . . [A]ttorneys are officers of the court, and '"when they address the judge solemnly upon a matter before the court, their declarations are virtually made under oath."' *State* v. *Brazile*, [226 La. 254, 266, 75 So. 2d 856, 860–861 (1954)]. (Emphasis deleted.) We find these considerations persuasive." *Id.*, at 485–486 (footnotes omitted).

Particularly where, as here, a defendant is on trial for his life, an attorney's judgment as to potential conflicts should carry special force.

Notwithstanding *Holloway*'s clear directive and the nature of the sentence imposed, the Mississippi Supreme Court sustained the refusal to permit counsel's withdrawal. In so ruling, the court relied on petitioner and Givhan's failure to testify, and on the absence of any clear indication that counsel "would have defended any differently or would have approached the defense of the case on another basis had he not been representing Givhan." 361 So. 2d, at 1365. Because the record did not "reflect any prejudice or harm resulting to [petitioner] on account of the alleged conflict of interest," *ibid.*, the court below found no constitutional infirmity.

Yet it was precisely this form of analysis that we rejected in *Glasser* and again in *Holloway*. *Glasser* unequivocally held that "[t]he right to have the assistance of counsel is too

fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." 315 U. S., at 76. After quoting this passage with approval, the *Holloway* Court made clear that where joint representation occurs over a defendant's express objection, "prejudice is presumed regardless of whether it [is] independently shown." 435 U. S., at 489. For the danger presented by a conflict of interest arises not simply from what an advocate does, which may be evident from the record, but from what he "finds himself compelled to *refrain* from doing," which may not be so readily apparent. *Id.*, at 490. To assess the effect of incompatible interests on all of an attorney's strategies at trial and in plea negotiations would, as we concluded in *Holloway*, be "virtually impossible." *Id.*, at 491.

Here, however, the Mississippi Supreme Court professed itself able to accomplish what *Holloway* explicitly recognized as beyond the competence of a reviewing tribunal. On this record, I cannot share the court's confidence that counsel would have approached the defense no differently had he represented only petitioner. More to the point, I believe that such speculation is inappropriate under *Holloway* and unsupportable in a capital case. Surely where a defendant's life is at stake, he is entitled to assistance from an attorney whose loyalty is beyond question.

I therefore dissent from the denial of certiorari.

No. 78–6091. WASHINGTON *v.* MISSISSIPPI. Sup. Ct. Miss.; and

No. 78–6253. FINNEY *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: No. 78–6091, 361 So. 2d 61; No. 78–6253, 242 Ga. 582, 250 S. E. 2d 388.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the

Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 77–952. GROUP LIFE & HEALTH INSURANCE CO. ET AL. *v.* ROYAL DRUG CO., INC., ET AL., 440 U. S. 205;

No. 77–1163. FRIEDMAN ET AL. *v.* ROGERS ET AL., 440 U. S. 1;

No. 77–1186. TEXAS OPTOMETRIC ASSN., INC. *v.* ROGERS ET AL., 440 U. S. 1;

No. 77–1337. NEVADA ET AL. *v.* HALL ET AL., 440 U. S. 410;

No. 78–733. POE *v.* MITCHELL, 440 U. S. 908;

No. 78–784. MORENO *v.* UNITED STATES, 440 U. S. 908;

No. 78–788. ESQUIRE, INC. *v.* RINGER, REGISTER OF COPYRIGHTS, 440 U. S. 908;

No. 78–791. GREENBLATT *v.* UNITED STATES, 440 U. S. 909;

No. 78–809. WALTON *v.* SMALL BUSINESS ADMINISTRATION, 440 U. S. 901;

No. 78–819. FROMMHAGEN *v.* UNITED STATES, 440 U. S. 909;

No. 78–871. SHANNON *v.* WATERHOUSE ET AL., EXECUTORS, 440 U. S. 911;

No. 78–970. ROWLETT ET AL. *v.* UNITED STATES, 440 U. S. 935;

No. 78–1083. KORNIT *v.* BOARD OF EDUCATION OF PLAINVIEW-OLD BETHPAGE SCHOOL DISTRICT, PLAINVIEW, NEW YORK, 440 U. S. 936;

No. 78–5648. FINNEGAN *v.* WASHINGTON, 440 U. S. 919;

No. 78–5744. LEVY *v.* UNITED STATES, 440 U. S. 920;

No. 78–5810. TURNER ET AL. *v.* JONES ET AL., 440 U. S. 962;

No. 78–5890. MCFERRAN *v.* ENLARGED CITY SCHOOL DISTRICT OF TROY, NEW YORK, 440 U. S. 923; and

No. 78–5929. LORENTZEN *v.* BOSTON COLLEGE, 440 U. S. 924. Petitions for rehearing denied.

No. 78–5956. BROWN *v.* UNITED STATES, 440 U. S. 948;

No. 78–5984. ISAACS ET UX. *v.* BOARD OF TRUSTEES OF TEMPLE UNIVERSITY ET AL., 440 U. S. 926;

No. 78–6008. SHAW *v.* CARYL, 440 U. S. 938;

No. 78–6032. ORONOZ *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO ET AL., 440 U. S. 944;

No. 78–6096. WELCH *v.* CELEBREZZE, CHIEF JUSTICE, SUPREME COURT OF OHIO, 440 U. S. 956; and

No. 78–6103. MILLER *v.* HUNT ET AL., 440 U. S. 938. Petitions for rehearing denied.

No. 78–268. GILLESPIE ET AL. *v.* SCHWARTZ ET AL., 439 U. S. 1034;

No. 78–361. BOSTON HOSPITAL FOR WOMEN *v.* SCHWARTZ ET AL., 439 U. S. 1034;

No. 78–410. LEE-HY PAVING CORP. ET AL. *v.* O'CONNOR, ADMINISTRATRIX, 439 U. S. 1034; and

No. 78–5499. WILLIAMS *v.* UNITED STATES, 439 U. S. 969. Motions for leave to file petitions for rehearing denied.

APRIL 23, 1979

Appeals Dismissed

No. 78–1374. MARTIN *v.* BOARD OF COUNTY COMMISSIONERS OF LEE COUNTY, FLORIDA, ET AL. Appeal from Sup. Ct. Fla. dismissed for want of substantial federal question. MR. JUSTICE BRENNAN would note probable jurisdiction and set case for oral argument. Reported below: 364 So. 2d 449.

No. 78–6060. ELAM *v.* VIRGINIA. Appeal from Sup. Ct. Va. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Certiorari Granted—Vacated and Remanded

No. 78–97. SEARS, ROEBUCK & CO. *v.* DAHM ET AL. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Chrysler Corp.* v. *Brown, ante,* p. 281. Reported below: 575 F. 2d 1197.

No. 78–79. GENERAL DYNAMICS CORP. *v.* MARSHALL, SECRETARY OF LABOR, ET AL. C. A. 8th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Chrysler Corp.* v. *Brown, ante,* p. 281. Reported below: 572 F. 2d 1211.

Miscellaneous Orders

No. ———. WHITE *v.* OFFICE OF PERSONNEL MANAGEMENT ET AL. C. A. D. C. Cir. Motion for leave to dispense with printing petition denied. See *Snider* v. *All State Administrators, Inc.,* 414 U. S. 685 (1974).

No. A–844 (78–1475). PENCE *v.* BROWN, SECRETARY OF DEFENSE, ET AL. C. A. 6th Cir. Application for stay, addressed to MR. JUSTICE BRENNAN and referred to the Court, denied.

No. A–867. CALLAHAN *v.* UNITED STATES. C. A. 5th Cir. Applications for bond, recall of mandate, transfer of sealed envelopes, and disclosure of certain materials, addressed to MR. JUSTICE MARSHALL and referred to the Court, denied.

No. D–146. IN RE DISBARMENT OF TEITELBAUM. Disbarment entered. [For earlier order herein, see 439 U. S. 975.]

No. D–159. IN RE DISBARMENT OF RATCLIFF. Disbarment entered. [For earlier order herein, see 440 U. S. 903.]

No. D–162. IN RE DISBARMENT OF TURNER. It is ordered that John Joseph Turner, of Chicago, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–163. IN RE DISBARMENT OF REEDY. It is ordered that James Phillip Reedy, of Chicago, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–164. In re Disbarment of Macurdy. It is ordered that Thomas E. Macurdy, of Natrona Heights, Pa., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–165. In re Disbarment of Rothbart. It is ordered that Norman Shine Rothbart, of Northbrook, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–166. In re Disbarment of Kaufman. It is ordered that Robert Kaufman, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–167. In re Disbarment of Reiser. It is ordered that Arthur A. Reiser, Jr., of Western Springs, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–168. In re Disbarment of Powell. It is ordered that Paul Lee Powell, of Chicago, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 78–605. United States et al. *v.* Rutherford et al. C. A. 10th Cir. [Certiorari granted, 439 U. S. 1127.] Motion of Northwest Academy of Preventive Medicine for leave to file a brief as *amicus curiae* granted.

No. 1, Orig. WISCONSIN ET AL. *v.* ILLINOIS ET AL.;
No. 2, Orig. MICHIGAN *v.* ILLINOIS ET AL.; and
No. 3, Orig. NEW YORK *v.* ILLINOIS ET AL., 388 U. S. 426. It is ordered that Honorable Albert B. Maris, Senior Judge of the United States Court of Appeals for the Third Circuit, be appointed Special Master in these cases with authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem necessary to call for. The Master is directed to submit such reports as he may deem appropriate.

The Master shall be allowed his actual expenses. The allowances to him, the compensation paid to his technical, stenographic and clerical assistants, the cost of printing his report, and all other proper expenses shall be charged against and be borne by the parties in such proportion as the Court may hereafter direct.

It is further ordered that if the position of Special Master in these cases becomes vacant during a recess of the Court, THE CHIEF JUSTICE shall have authority to make a new designation which shall have the same effect as if originally made by the Court.

The motion for leave to file petition for modification of decree is referred to the Special Master.

No. 78–711. SOUTHEASTERN COMMUNITY COLLEGE *v.* DAVIS. C. A. 4th Cir. [Certiorari granted, 439 U. S. 1065.] Motion of the Solicitor General for leave to file a brief as *amicus curiae* granted.

No. 78–752. BAKER *v.* MCCOLLAN. C. A. 5th Cir. [Certiorari granted, 439 U. S. 1114.] Motion of American Civil Liberties Union et al. to participate in oral argument as *amici curiae* denied.

No. 78–6438. YOST *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. Motion for leave to file petition for writ of habeas corpus denied.

No. 78–6296. CARLOS *v.* UNITED STATES ET AL. Motion for leave to file petition for writ of mandamus denied.

Probable Jurisdiction Postponed

No. 78–1155. VITEK, CORRECTIONAL DIRECTOR, ET AL. *v.* JONES. Appeal from D. C. Neb. Motion of appellee for leave to proceed *in forma pauperis* granted. Further consideration of question of jurisdiction postponed to hearing of case on the merits. Reported below: See 437 F. Supp. 569.

Certiorari Granted

No. 78–1335. VILLAGE OF SCHAUMBURG *v.* CITIZENS FOR A BETTER ENVIRONMENT ET AL. C. A. 7th Cir. Certiorari granted. Reported below: 590 F. 2d 220.

Certiorari Denied. (See also No. 78–6060, *supra.*)

No. 78–1117. SMITH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 584 F. 2d 759.

No. 78–1191. CERRELLA ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 582 F. 2d 974.

No. 78–1211. TUCKER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 586 F. 2d 845.

No. 78–1228. SEIDLITZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 589 F. 2d 152.

No. 78–1233. MITCHELL *v.* MID-CONTINENT SPRING COMPANY OF KENTUCKY; and

No. 78–1373. MID-CONTINENT SPRING COMPANY OF KENTUCKY *v.* MITCHELL. C. A. 6th Cir. Certiorari denied. Reported below: 583 F. 2d 275.

No. 78–1245. GEDERS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 585 F. 2d 1303.

No. 78–1262. FLOWERS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 595 F. 2d 1209.

No. 78–1267. HICKS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 587 F. 2d 252.

No. 78–1272. NOALL *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 587 F. 2d 123.

No. 78–1331. WEINGER *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 63 Ill. App. 3d 171, 379 N. E. 2d 810.

No. 78–1333. STANDARD ALLIANCE INDUSTRIES, INC. *v.* BLACK CLAWSON CO. C. A. 6th Cir. Certiorari denied. Reported below: 587 F. 2d 813.

No. 78–1339. TAYLOR *v.* NASHVILLE BANNER PUBLISHING CO. Ct. App. Tenn. Certiorari denied. Reported below: 573 S. W. 2d 476.

No. 78–1349. KERNER *v.* STATE EMPLOYEES' RETIREMENT SYSTEM OF ILLINOIS ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 72 Ill. 2d 507, 382 N. E. 2d 243.

No. 78–1350. LEONARD *v.* EXXON CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 581 F. 2d 522.

No. 78–1354. KLUGE *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 78–1360. FIORE *v.* COUNTY OF WESTMORELAND ET AL. Pa. Commw. Ct. Certiorari denied. Reported below: 36 Pa. Commw. 493, 388 A. 2d 1119.

No. 78–1361. MCCOY *v.* LINCOLN INTERMEDIATE UNIT NO. 12. Pa. Commw. Ct. Certiorari denied. Reported below: 38 Pa. Commw. 29, 391 A. 2d 1119.

No. 78–1362. WALKER *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 55 Ohio St. 2d 208, 378 N. E. 2d 1049.

No. 78–1364. RUDOLPH *v.* WAGNER ELECTRIC CORP. C. A. 8th Cir. Certiorari denied. Reported below: 586 F. 2d 90.

No. 78–1367. COOK *v.* MUSKINGUM WATERSHED CONSERVANCY DISTRICT. C. A. 6th Cir. Certiorari denied. Reported below: 573 F. 2d 1310.

No. 78–1371. BUIAN *v.* BAUGHARD ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 595 F. 2d 1222.

No. 78–1395. ZARINSKY *v.* NEW JERSEY ET AL. C. A. 3d Cir. Certiorari denied.

No. 78–1404. BALL ET AL. *v.* CAREY, GOVERNOR OF NEW YORK, ET AL. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 64 App. Div. 2d 723, 407 N. Y. S. 2d 76.

No. 78–1425. COLE ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 586 F. 2d 747.

No. 78–1448. BENNETT *v.* SECRETARY OF DEFENSE. C. A. D. C. Cir. Certiorari denied.

No. 78–1469. WHEELER DEALERS, INC. *v.* RALEIGH INDUSTRIES OF AMERICA, INC. C. A. 7th Cir. Certiorari denied. Reported below: 590 F. 2d 338.

No. 78–1485. HANLEY ET AL. *v.* UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF OHIO. C. A. 6th Cir. Certiorari denied.

No. 78–6066. EDMOND *v.* BERNHARDT, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 590 F. 2d 334.

No. 78–6081. LADANY *v.* OVERBERG, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 586 F. 2d 844.

No. 78–6116. BLANDING *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 595 F. 2d 1226.

No. 78–6165. LYONS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 582 F. 2d 1270.

No. 78–6177. JOHN ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 587 F. 2d 683.

No. 78–6183. PLATEL *v.* YOUNG, CHIEF JUDGE, U. S. DISTRICT COURT. C. A. 5th Cir. Certiorari denied. Reported below: 588 F. 2d 1355.

No. 78–6295. NATSON *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 242 Ga. 618, 250 S. E. 2d 420.

No. 78–6297. HOLSEY *v.* MANDEL. C. A. 4th Cir. Certiorari denied. Reported below: 588 F. 2d 1348.

No. 78–6305. COFFEY *v.* NORTH CAROLINA. C. A. 4th Cir. Certiorari denied. Reported below: 586 F. 2d 837.

No. 78–6306. HULING *v.* OHIO. Ct. App. Ohio, Summit County. Certiorari denied.

No. 78–6307. MILLER *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 85 Cal. App. 3d 194, 149 Cal. Rptr. 204.

No. 78–6309. QUEEN ET AL. *v.* LEEKE, CORRECTIONS COMMISSIONER, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 584 F. 2d 977.

No. 78–6311. GREEN *v.* WHITE, TRAINING CENTER SUPERINTENDENT. C. A. 8th Cir. Certiorari denied. Reported below: 589 F. 2d 378.

No. 78–6312. LADD *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 56 Ohio St. 2d 197, 383 N. E. 2d 579.

No. 78–6313. BRACEY *v.* HEERINGA ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 588 F. 2d 838.

No. 78–6314. MORRIS *v.* JAGO, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 590 F. 2d 335.

No. 78–6316. GIBSON *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 359 So. 2d 147.

No. 78–6323. JACOBS *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 34 Ore. App. 755, 579 P. 2d 881.

No. 78–6324. LIGHTNER *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 78–6327. GREEN *v.* MISSOURI ET AL. C. A. 8th Cir. Certiorari denied.

No. 78–6328. BUNDY *v.* UTAH. Sup. Ct. Utah. Certiorari denied. Reported below: 589 P. 2d 760.

No. 78–6331. MUSTO *v.* ENGLE, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 590 F. 2d 335.

No. 78–6332. EDWARDS *v.* CITY OF SEATTLE ET AL. Sup. Ct. Wash. Certiorari denied.

No. 78–6334. SARNESCKY *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 78–6382. DOW *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 591 F. 2d 101.

No. 78–6392. REGELIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 78–6398. DAVIS *v.* SEDGWICK ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 590 F. 2d 341.

No. 78–6400. MARTINO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 78–6401. BACA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 78–6403. BRADEN *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied.

No. 78–6410. HUDSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 591 F. 2d 1345.

No. 78–6426. WEINRICH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 586 F. 2d 481.

No. 78–707. ATKINS *v.* LOUISIANA. Sup. Ct. La. Certiorari denied, it appearing that the judgment below rests on independent and adequate state grounds. Reported below: 360 So. 2d 1341.

No. 78–793. DILEO *v.* BOARD OF REGENTS OF THE UNIVERSITY OF COLORADO ET AL. Sup. Ct. Colo. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 196 Colo. 216, 590 P. 2d 486.

No. 78–961. GAMBINO *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL would grant certiorari and reverse the conviction. Reported below: 362 So. 2d 1107.

No. 78–1247. IMPERIAL DISTRIBUTORS, INC., ET AL. *v.* PETTINE, U. S. DISTRICT JUDGE. C. A. 1st Cir. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL would grant certiorari and reverse the judgment.

No. 78–6439. HAMPTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 78–6086. PENDLETON *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 363 So. 2d 885.

Rehearing Denied

No. 77–1255. ANDERS, SOLICITOR OF RICHLAND COUNTY *v.* FLOYD, 440 U. S. 445; and

No. 78–956. COVEN *v.* SECURITIES AND EXCHANGE COMMISSION, 440 U. S. 950. Petitions for rehearing denied.

No. 78–5645. GAUTAM *v.* FIRST NATIONAL CITY BANK, 440 U. S. 919. Motion for leave to file petition for rehearing denied.

APRIL 25, 1979

Miscellaneous Order

No. A–887. LOUISVILLE & NASHVILLE RAILROAD CO. *v.* SULLIVAN, ADMINISTRATOR, FEDERAL RAILROAD ADMINISTRATION, ET AL. The document captioned "Application for an order continuing the injunction granted by a panel of the United States Court of Appeals for the District of Columbia Circuit but vacated by that Court *en banc*, pending the timely filing of a petition for writ of certiorari and its consideration by this Court" was presented to THE CHIEF JUSTICE and by him referred to the Court. Treating the papers as an application for a stay, pending the timely filing and disposition of a petition for a writ of certiorari, the application is denied. MR. JUSTICE STEVENS would grant the stay.

APRIL 30, 1979

Appeals Dismissed

No. 78–1433. CHUBB *v.* PENNSYLVANIA. Appeal from Super. Ct. Pa. dismissed for want of substantial federal question. Reported below: 261 Pa. Super. 402, 395 A. 2d 964.

No. 78–5989. MUSE *v.* LOUISIANA. Appeal from Sup. Ct. La. dismissed for want of substantial federal question. Reported below: 363 So. 2d 462.

No. 78–6358. CRANE ET UX. *v.* CARROLL COUNTY DEPARTMENT OF FAMILY AND CHILDREN SERVICES. Appeal from Sup. Ct. Ga. dismissed for want of substantial federal question. Reported below: 242 Ga. 737, 251 S. E. 2d 299.

Certiorari Granted—Vacated and Remanded. (See also No. 77–5992, *ante*, p. 418; and No. 78–5885, *ante*, p. 468.)

No. 78–582. NORTH CAROLINA *v.* CONNLEY. Sup. Ct. N. C. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *North Carolina* v. *Butler*, *ante*, p. 369. Reported below: 295 N. C. 327, 245 S. E. 2d 663.

No. 78–1051. UNITED STATES *v.* FINAZZO ET AL. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Dalia* v. *United States*, *ante*, p. 238. Reported below: 583 F. 2d 837.

Certiorari Granted—Reversed. (See No. 78–1223, *ante*, p. 463.)

*Miscellaneous Orders**

No. D–139. IN RE DISBARMENT OF WANDEL. Disbarment entered. [For earlier order herein, see 439 U. S. 906.]

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*For the Court's orders prescribing amendments to the Federal Rules of Appellate Procedure, see *post*, p. 971; amendments to the Rules of Criminal Procedure for the United States District Courts, see *post*, p. 987; amendments to the Rules Governing Proceedings in the United States District Courts under 28 U. S. C. §§ 2254 and 2255, see *post*, p. 1003; and an amendment to the Federal Rules of Evidence, see *post*, p. 1007.

No. 77–1465. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U. S. DEPARTMENT OF LABOR *v.* RASMUSSEN ET AL.; and

No. 77–1491. GEO CONTROL, INC., ET AL. *v.* RASMUSSEN ET AL., 440 U. S. 29. Motion of respondents for clarification of order denying motion for award of attorney's fees, entered April 2, 1979 [440 U. S. 978], denied. MR. JUSTICE POWELL took no part in the consideration or decision of this motion.

No. 77–1645. TRANSAMERICA MORTGAGE ADVISORS, INC. (TAMA), ET AL. *v.* LEWIS. C. A. 9th Cir. [Certiorari granted, 439 U. S. 952];

No. 77–1844. CITY OF MOBILE, ALABAMA, ET AL. *v.* BOLDEN ET AL. C. A. 5th Cir. [Probable jurisdiction noted, 439 U. S. 815];

No. 78–357. WILLIAMS ET AL. *v.* BROWN ET AL. C. A. 5th Cir. [Probable jurisdiction noted, 439 U. S. 925];

No. 78–425. P. C. PFEIFFER CO., INC., ET AL. *v.* FORD ET AL. C. A. 5th Cir. [Certiorari granted, 439 U. S. 978];

No. 78–5420. PAYTON *v.* NEW YORK; and

No. 78–5421. RIDDICK *v.* NEW YORK. Ct. App. N. Y. [Probable jurisdiction noted, 439 U. S. 1044.] These cases are restored to the calendar for reargument.

No. 78–1006. BROWN, SECRETARY OF DEFENSE, ET AL. *v.* GLINES. C. A. 9th Cir. [Certiorari granted, 440 U. S. 957.] Motion of respondent for appointment of counsel granted, and it is ordered that David Michael Cobin, Esquire, of St. Paul, Minn., be appointed to serve as counsel for respondent in this case.

No. 78–6359. GREEN *v.* RALSTON, U. S. MAGISTRATE, ET AL. Motion for leave to file petition for writ of mandamus denied.

Certiorari Denied

No. 78–385. VOLPE ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 578 F. 2d 1372.

No. 78–1127. BRADFORD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 588 F. 2d 1235.

No. 78–1179. GRANT ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 582 F. 2d 1272.

No. 78–1206. LATSHAW *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 481 Pa. 298, 392 A. 2d 1301.

No. 78–1213. PARIS *v.* COOPER ET AL. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 352 So. 2d 534.

No. 78–1221. DANIELS *v.* KIESER. C. A. 7th Cir. Certiorari denied. Reported below: 586 F. 2d 64.

No. 78–1222. WESTERN COMMUNICATIONS, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 191 U. S. App. D. C. 71, 589 F. 2d 594.

No. 78–1275. RINN ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 586 F. 2d 113.

No. 78–1278. JOHN *v.* GOVERNMENT OF THE VIRGIN ISLANDS. C. A. 3d Cir. Certiorari denied. Reported below: 588 F. 2d 820.

No. 78–1284. BUB DAVIS PACKING CO., INC. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 584 F. 2d 116.

No. 78–1288. HIGGINS ET AL. *v.* MARSHALL, SECRETARY OF LABOR, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 190 U. S. App. D. C. 54, 584 F. 2d 1035.

No. 78–1308. FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES *v.* CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 585 F. 2d 150.

No. 78–1337. GILIBERTO, JUDGE, ET AL. *v.* COMPAGNIE NATIONALE AIR FRANCE ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 74 Ill. 2d 90, 383 N. E. 2d 977.

No. 78–1358. FRAZIER *v.* KAPLAN, JUDGE, ET AL. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 359 So. 2d 1237.

No. 78–1368. CONSOLIDATED CARRIERS CORP. ET AL. *v.* CLOAK DRESS DRIVERS & HELPERS UNION LOCAL 102, INTERNATIONAL LADIES' GARMENT WORKERS' UNION. C. A. 2d Cir. Certiorari denied. Reported below: 594 F. 2d 851.

No. 78–1370. CALIFORNIA & HAWAIIAN SUGAR CO. ET AL. *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 588 F. 2d 1270.

No. 78–1376. DRESSER INDUSTRIES, INC. *v.* COMMUNITY TELEVISION SERVICES, INC. C. A. 8th Cir. Certiorari denied. Reported below: 586 F. 2d 637.

No. 78–1381. MIAMI COPPER COMPANY DIVISION, TENNESSEE CORP. *v.* TAX COMMISSION OF ARIZONA. Ct. App. Ariz. Certiorari denied. Reported below: 121 Ariz. 150, 589 P. 2d 24.

No. 78–1385. LEBOWITZ *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 343 So. 2d 666.

No. 78–1392. HARRINGTON *v.* VANDALIA-BUTLER BOARD OF EDUCATION. C. A. 6th Cir. Certiorari denied. Reported below: 585 F. 2d 192.

No. 78–1427. ROSS ET AL. *v.* SWARTZBERG ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 590 F. 2d 337.

No. 78–1437. GOTTESMAN ET AL. *v.* GENERAL MOTORS CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 573 F. 2d 1290.

No. 78–1456. BAKER ET AL. *v.* ELCONA HOMES CORP. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 588 F. 2d 551.

No. 78–1473. PACKARD *v.* CITY OF VALLEJO. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 78–5552. PATMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 557 F. 2d 1181.

No. 78–6007. STEWART *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 585 F. 2d 799.

No. 78–6090. KINCAID *v.* COMMISSIONER OF FINANCE AND CONTROL OF CONNECTICUT ET AL. App. Sess., Super. Ct. Conn. Certiorari denied.

No. 78–6181. PRLNZLER *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA (KLEINMAN ET AL., REAL PARTIES IN INTEREST). C. A. 9th Cir. Certiorari denied.

No. 78–6197. SOBLOTNEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 78–6214. MASON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 588 F. 2d 824.

No. 78–6216. FARIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 591 F. 2d 1337.

No. 78–6221. GALLAGHER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 591 F. 2d 1337.

No. 78–6226. MCGOWAN *v.* UNITED STATES; and

No. 78–6227. SWIDERSKI *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 193 U. S. App. D. C. 92, 593 F. 2d 1246.

No. 78–6244. GANDOLFO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 577 F. 2d 955.

No. 78–6250. CRAWFORD *v.* JACKSON, CORRECTIONS DIRECTOR, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 191 U. S. App. D. C. 170, 589 F. 2d 693.

No. 78–6256. SHEPARD *v.* OHIO. Ct. App. Ohio, Champaign County. Certiorari denied.

No. 78–6258. WALDRON *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 590 F. 2d 33.

No. 78–6301. CLEVELAND *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 78–6318. APONTE *v.* SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 1st Cir. Certiorari denied. Reported below: 588 F. 2d 818.

No. 78–6325. PHELPS *v.* COMMISSIONER OF CORRECTION ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 580 F. 2d 1049.

No. 78–6326. PHELPS *v.* MARYLAND ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 580 F. 2d 1049.

No. 78–6338. POSADA *v.* CLANON, MEDICAL FACILITY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 78–6341. ABRAM *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 353 So. 2d 1019.

No. 78–6342. MILES *v.* BORDENKIRCHER, PENITENTIARY SUPERINTENDENT, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 590 F. 2d 335.

No. 78–6343. VAUGHN *v.* OREGON EX REL. JUVENILE DEPARTMENT OF MULTNOMAH COUNTY. Ct. App. Ore. Certiorari denied.

No. 78–6344. DOLEN *v.* TELEVISION STATION TV 12 ET AL. C. A. 1st Cir. Certiorari denied.

No. 78–6346. PLEASANT *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 21 Wash. App. 177, 583 P. 2d 680.

No. 78–6353. CYRUS *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 269 Ind. 461, 381 N. E. 2d 472.

No. 78–6360. GREEN *v.* MISSOURI BOARD OF PROBATION AND PAROLE. C. A. 8th Cir. Certiorari denied.

No. 78–6361. CLOUDY *v.* SUPREME COURT OF INDIANA. C. A. 7th Cir. Certiorari denied. Reported below: 594 F. 2d 867.

No. 78–6363. HIGHTOWER *v.* JAGO, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 590 F. 2d 334.

No. 78–6365. MCMILLIAN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 574 S. W. 2d 777.

No. 78–6366. CLOUDY *v.* COURT OF APPEALS OF INDIANA. C. A. 7th Cir. Certiorari denied. Reported below: 594 F. 2d 867.

No. 78–6372. GINGRAS *v.* MASON ET AL. C. A. 1st Cir. Certiorari denied.

No. 78–6404. GOODWYN *v.* DELUCA, U. S. ATTORNEY, ET AL. C. A. 3d Cir. Certiorari denied.

No. 78–6408. CARTER *v.* ROBERTSON. C. A. 5th Cir. Certiorari denied.

No. 78–6419. VAUGHN *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 296 N. C. 167, 250 S. E. 2d 210.

No. 78–6425. GORDON *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 78–6441. BENNS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 594 F. 2d 859.

No. 78–6448. VOORHEES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 593 F. 2d 346.

No. 78–6460. HARVEY *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 395 A. 2d 92.

No. 78–6464. MCCALL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 592 F. 2d 1066.

No. 78–6465. THORNTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 590 F. 2d 1359.

No. 78–6467. LUDDINGTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 589 F. 2d 236.

No. 78–6471. MORENO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 588 F. 2d 490.

No. 78–6472. DISILVESTRO *v.* VETERANS' ADMINISTRATION. C. A. 2d Cir. Certiorari denied.

No. 78–6473. ROBINSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 588 F. 2d 1030.

No. 78–6476. WILSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 595 F. 2d 1215.

No. 78–6477. HEREDIA-NARANJO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 78–6484. MORRISON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 595 F. 2d 1215.

No. 78–6485. MARCANTONI ET UX. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 590 F. 2d 1324.

No. 78–6163. WASHINGTON *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 362 So. 2d 658.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

Rehearing Denied

No. 76–6853. RANDLE ET AL. *v.* BEAL, SECRETARY, DEPARTMENT OF PUBLIC WELFARE OF PENNSYLVANIA, ET AL., 440 U. S. 957;

No. 78–1209. RICHARDSON ET AL. *v.* UNITED STATES, 440 U. S. 947; and

No. 78–6154. LOVALLO *v.* VETERANS' ADMINISTRATION ET AL., 440 U. S. 966. Petitions for rehearing denied.

No. 78–6035. HERNANDEZ *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, 440 U. S. 973; and

No. 78–6048. SPENKELINK *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA, 440 U. S. 976. Petitions for rehearing denied. MR. JUSTICE POWELL took no part in the consideration or decision of these petitions.

MAY 1, 1979

Dismissal Under Rule 60

No. 78–1122. GRAND LODGE OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS *v.* BENDA ET AL. Certiorari dismissed under this Court's Rule 60. Reported below: 584 F. 2d 308.

MAY 7, 1979

Dismissal Under Rule 60

No. 78–6167. BAYLESS *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 60. Reported below: 583 F. 2d 730.

MAY 14, 1979

Affirmed on Appeal

No. 78–1166. CHURCH OF SCIENTOLOGY OF CALIFORNIA ET AL. *v.* BLUMENTHAL, SECRETARY OF THE TREASURY, ET AL. Affirmed on appeal from D. C. C. D. Cal. MR. JUSTICE BLACKMUN and MR. JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 460 F. Supp. 56.

No. 78–1393. CHERRY *v.* SECRETARY OF THE TREASURY. Affirmed on appeal from D. C. S. D. N. Y. Reported below: 460 F. Supp. 606.

Appeals Dismissed

No. 78–895. SATTERFIELD *v.* SUNNY DAY RESOURCES, INC. Sup. Ct. Wyo. Appeal dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 581 P. 2d 1386.

No. 78–1219. MORRILL *v.* JANKLOW, GOVERNOR OF SOUTH DAKOTA. Appeal from Sup. Ct. S. D. dismissed for want of substantial federal question. MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE BLACKMUN would note probable jurisdiction and set case for oral argument. Reported below: — S. D. —, 271 N. W. 2d 356.

No. 78–1417. HANSEN *v.* MINNESOTA STATE BOARD OF BAR EXAMINERS ET AL. Appeal from Sup. Ct. Minn. dismissed for want of substantial federal question. Reported below: 275 N. W. 2d 790.

No. 78–1508. RUDDER ET AL. *v.* WISE COUNTY HOUSING AND REDEVELOPMENT AUTHORITY. Appeal from Sup. Ct. Va. dismissed for want of substantial federal question. Reported below: 219 Va. 592, 249 S. E. 2d 177.

No. 78–1401. CITY OF MIAMI *v.* ST. JOE PAPER CO. ET AL. Appeal from Sup. Ct. Fla. dismissed for want of substantial federal question. Reported below: 364 So. 2d 439.

No. 78–1405. THIES *v.* JOINT BAR ASSOCIATION GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS. Appeal from Ct. App. N. Y. Motion of New York County Lawyers Assn. for leave to file a brief as *amicus curiae* granted. Appeal dismissed for want of substantial federal question. MR. JUSTICE BRENNAN and MR. JUSTICE POWELL would note probable jurisdiction and set case for oral argument. Reported below: 45 N. Y. 2d 865 and 924, 382 N. E. 2d 1351.

No. 78–5441. ROBINSON, A MINOR, BY COE *v.* KOLSTAD ET AL. Appeal from Sup. Ct. Wis. dismissed for want of substantial federal question. MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 84 Wis. 2d 579, 267 N. W. 2d 886.

Certiorari Granted—Vacated and Remanded

No. 78–1194. REEVES, INC. *v.* KELLEY ET AL. C. A. 8th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Hughes* v. *Oklahoma, ante,* p. 322. Reported below: 586 F. 2d 1230.

No. 78–1375. UNITED STATES *v.* SANTORA. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Dalia* v. *United States, ante,* p. 238. Reported below: 583 F. 2d 453.

Miscellaneous Orders

No. A–929. FRAZIER *v.* BARBERA. Munic. Ct., Pasadena Jud. Dist., Cal. Application for stay, addressed to MR. JUSTICE MARSHALL and referred to the Court, denied.

No. A–955. OLSON ET AL. *v.* UNITED STATES. C. A. 5th Cir. Application for stay, addressed to MR. JUSTICE BRENNAN and referred to the Court, denied.

No. D–160. IN RE DISBARMENT OF FODIMAN. Aaron R. Fodiman of Arlington, Va., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on February 26, 1979 [440 U. S. 932], is hereby discharged.

No. D–161. IN RE DISBARMENT OF BONG HYUN KIM. Bong Hyun Kim, of Chicago, Ill., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on February 26, 1979 [440 U. S. 933], is hereby discharged.

No. D–168. IN RE DISBARMENT OF POWELL. Paul Lee Powell, of Chicago, Ill., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on April 23, 1979 [*ante*, p. 920], is hereby discharged.

No. 77–1546. STAFFORD, U. S. ATTORNEY, ET AL. *v.* BRIGGS ET AL. C. A. D. C. Cir. [Certiorari granted, 439 U. S. 1113]; and

No. 78–303. COLBY, DIRECTOR, CENTRAL INTELLIGENCE AGENCY, ET AL. *v.* DRIVER ET AL. C. A. 1st Cir. [Certiorari granted, 439 U. S. 1113.] Cases are restored to calendar for reargument. MR. JUSTICE MARSHALL dissents. MR. JUSTICE WHITE took no part in the consideration or decision of these orders.

No. 78–6543. PAVAO *v.* ANDERSON, WARDEN. Motion for leave to file petition for writ of habeas corpus denied.

No. 81, Orig. KENTUCKY *v.* INDIANA ET AL. It is ordered that the Honorable Robert Van Pelt, Senior Judge of the United States District Court for the District of Nebraska, be appointed Special Master in this case with authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem necessary to call for. The Master is directed to submit such reports as he may deem appropriate.

The Master shall be allowed his actual expenses. The allowances to him, the compensation paid to his technical, stenographic and clerical assistants, the cost of printing his report, and all other proper expenses shall be charged against and be borne by the parties in such proportion as the Court may hereafter direct.

It is further ordered that if the position of the Special Master in this case becomes vacant during a recess of the Court, THE CHIEF JUSTICE shall have authority to make a new designation which shall have the same effect as if originally made by the Court.

The motion of Public Service Company of Indiana, Inc., for leave to intervene is referred to the Special Master. [For earlier order herein, see 440 U. S. 902.]

Probable Jurisdiction Noted

No. 78–1201. MOBIL OIL CORP. *v.* COMMISSIONER OF TAXES OF VERMONT. Appeal from Sup. Ct. Vt. Motions of Committee on State Taxation of the Council of State Chambers of Commerce and National Association of Manufacturers for leave to file briefs as *amici curiae* granted. Probable jurisdiction noted. MR. JUSTICE STEWART took no part in the consideration or decision of this appeal. Reported below: 136 Vt. 545, 394 A. 2d 1147.

Certiorari Granted

No. 78–1175. HATZLACHH SUPPLY CO., INC. *v.* UNITED STATES. Ct. Cl. Certiorari granted. Reported below: 217 Ct. Cl. 423, 579 F. 2d 617.

No. 78–1202. CHIARELLA *v.* UNITED STATES. C. A. 2d Cir. Certiorari granted. Reported below: 588 F. 2d 1358.

No. 78–1248. GTE SYLVANIA, INC., ET AL. *v.* CONSUMERS UNION OF THE UNITED STATES, INC., ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: 192 U. S. App. D. C. 93, 590 F. 2d 1209.

No. 78–1327. BOEING CO. *v.* VAN GEMERT ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 590 F. 2d 433.

No. 78–1418. BLOOMER *v.* LIBERTY MUTUAL INSURANCE CO. C. A. 2d Cir. Certiorari granted. Reported below: 586 F. 2d 908.

No. 78–1455. UNITED STATES *v.* GILLOCK. C. A. 6th Cir. Certiorari granted. Reported below: 587 F. 2d 284.

No. 78–1501. MCLAIN ET AL. *v.* REAL ESTATE BOARD OF NEW ORLEANS, INC., ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 583 F. 2d 1315.

No. 78–1118. FORSHAM ET AL. *v.* CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL. C. A. D. C. Cir. Certiorari granted, and case set for oral argument in tandem with No. 78–1088, *Kissinger* v. *Reporters Committee for Freedom of the Press,* and No. 78–1217, *Reporters Committee for Freedom of the Press* v. *Kissinger* [certiorari granted, *ante,* p. 904]. Reported below: 190 U. S. App. D. C. 231, 587 F. 2d 1128.

No. 78–1453. UNITED STATES ET AL. *v.* EUGE. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 587 F. 2d 25.

Certiorari Denied. (See also No. 78–895, *supra.*)

No. 78–765. MICHIGAN *v.* CONNER. Ct. App. Mich. Certiorari denied.

No. 78–861. GLASSCOCK *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied. Reported below: 570 S. W. 2d 354.

No. 78–1111. SIELAFF ET AL. *v.* DREW ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 588 F. 2d 838.

No. 78–1176. EXXON CORP. ET AL. *v.* FEDERAL TRADE COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 191 U. S. App. D. C. 59, 589 F. 2d 582.

No. 78–1184. BOTELER *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 363 So. 2d 279.

No. 78–1226. OTTERBEIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 588 F. 2d 1352.

No. 78–1239. SAFIR *v.* BLACKWELL, ASSISTANT SECRETARY OF COMMERCE, ET AL.; and

No. 78–1311. SAFIR *v.* AMERICAN EXPORT LINES, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 579 F. 2d 742.

No. 78–1258. SCHLANGER *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 586 F. 2d 667.

No. 78–1259. SHREEVES *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 395 A. 2d 774.

No. 78–1265. VILLANUEVA *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 3d Cir. Certiorari denied. Reported below: 588 F. 2d 825.

No. 78–1287. AMERICAN MARITIME ASSN. *v.* BLUMENTHAL, SECRETARY OF THE TREASURY, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 192 U. S. App. D. C. 40, 590 F. 2d 1156.

No. 78–1295. BOTERO ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 589 F. 2d 430.

No. 78–1296. GIACALONE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 588 F. 2d 1158.

No. 78–1299. 91.90 ACRES OF LANDS, SITUATE IN MONROE COUNTY, MISSOURI *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 586 F. 2d 79.

No. 78–1302. WALL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 590 F. 2d 245.

No. 78–1306. EASTERN PHOTOGRAPHIC LABORATORIES, INC., ET AL. *v.* BRAUNSTEIN. C. A. 2d Cir. Certiorari denied. Reported below: 600 F. 2d 335.

No. 78–1324. JACKSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 595 F. 2d 1226.

No. 78–1329. UNITED STATES *v.* NAVAJO TRIBE ET AL. Ct. Cl. Certiorari denied. Reported below: 218 Ct. Cl. 11, 586 F. 2d 192.

No. 78–1345. RYAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 594 F. 2d 853.

No. 78–1356. MACOMB CONCRETE CORP. *v.* EARL DUBEY & SONS, INC., ET AL. Ct. App. Mich. Certiorari denied. Reported below: 81 Mich. App. 662, 266 N. W. 2d 152.

No. 78–1359. GUNDUY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 598 F. 2d 610.

No. 78–1394. PROFESSIONAL AIR TRAFFIC CONTROLLERS ORGANIZATION *v.* AIR TRANSPORT ASSOCIATION OF AMERICA. C. A. 2d Cir. Certiorari denied. Reported below: 594 F. 2d 851.

No. 78–1408. PROCELL *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 365 So. 2d 484.

No. 78–1409. WILLIAMS *v.* PORT AUTHORITY OF NEW YORK AND NEW JERSEY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 584 F. 2d 974.

No. 78–1410. HELDON *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 78–1413. SIMS, DBA BICENTENNIAL SHOP *v.* KIRO, INC. Ct. App. Wash. Certiorari denied. Reported below: 20 Wash. App. 229, 580 P. 2d 642.

No. 78–1419. BROCKETT, PROSECUTING ATTORNEY OF SPOKANE COUNTY *v.* SPOKANE ARCADES, INC., ET AL. C. A. 9th Cir. Certiorari denied.

No. 78–1434. WILSON *v.* OHIO. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 78–1439. COHN ET AL. *v.* CITY OF NORWALK PLANNING AND ZONING COMMISSION ET AL. Super. Ct. Conn., Fairfield County. Certiorari denied.

No. 78–1443. STROUSE ET AL. *v.* WINTER. Sup. Ct. Okla. Certiorari denied. Reported below: 589 P. 2d 217.

No. 78–1446. BARNES *v.* CHESAPEAKE & OHIO RAILWAY CO. Sup. Ct. Ky. Certiorari denied. Reported below: 593 S. W. 2d 510.

No. 78–1447. STRAIN ET AL. *v.* TURNER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 588 F. 2d 829.

No. 78–1450. DALEY *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied.

No. 78–1458. PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC. *v.* CITY OF NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 64 App. Div. 2d 1038, 407 N. Y. S. 2d 771.

No. 78–1459. FEELINGS *v.* LEFEVRE, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 594 F. 2d 851.

No. 78–1460. APPLE THEATRE, INC. *v.* CITY OF SEATTLE. Sup. Ct. Wash. Certiorari denied. Reported below: 90 Wash. 2d 709, 585 P. 2d 1153.

No. 78–1471. LITTLE *v.* UNITED STATES.; and
No. 78–6423. ROBERTSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 588 F. 2d 575.

No. 78–1476. LYNCH *v.* INDIANA STATE UNIVERSITY BOARD OF TRUSTEES. Ct. App. Ind. Certiorari denied. Reported below: —— Ind. App. ——, 378 N. E. 2d 900.

No. 78–1490. GRAHAM ET AL. *v.* BUCKS COUNTY BOARD OF ASSESSMENT APPEALS. Sup. Ct. Pa. Certiorari denied.

No. 78–1497. HEAVRIN *v.* KENTUCKY BAR ASSN. Sup. Ct. Ky. Certiorari denied. Reported below: 573 S. W. 2d 916.

No. 78–1503. SOCIALIST WORKERS PARTY ET AL. *v.* EU, SECRETARY OF STATE OF CALIFORNIA. C. A. 9th Cir. Certiorari denied. Reported below: 591 F. 2d 1252.

No. 78–1517. HATHORN, MAYOR OF LOUISVILLE, ET AL. *v.* LOVORN ET AL. Sup. Ct. Miss. Certiorari denied. Reported below: 365 So. 2d 947.

No. 78–1525. NOWLIN *v.* CITY OF PEARL, MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 365 So. 2d 952.

No. 78–1528. SCALES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 594 F. 2d 558.

No. 78–1532. MERCURI *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 595 F. 2d 1206.

No. 78–1543. SPERLING *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 595 F. 2d 1209.

No. 78–1563. HENDERSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 591 F. 2d 1344.

No. 78–1565. ASPURU ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 588 F. 2d 490.

No. 78–1572. HERRING *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 590 F. 2d 332.

No. 78–1574. LINARES ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 588 F. 2d 490.

No. 78–1594. COHEN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 594 F. 2d 855.

No. 78–5968. SPEECH *v.* UNITED STATES;
No. 78–6149. WILSON *v.* UNITED STATES; and
No. 78–6161. JONES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 593 F. 2d 553.

No. 78–5992. FORD *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 264 Ark. 141, 569 S. W. 2d 105.

No. 78–6050. HAUCK *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 586 F. 2d 1296.

No. 78–6101. ROGERS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 588 F. 2d 831.

No. 78–6129. CLENNY *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied. Reported below: 576 S. W. 2d 12.

No. 78–6137. CANNON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 582 F. 2d 1277.

No. 78–6176. ROBINSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 585 F. 2d 274.

No. 78–6194. HARRIES *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 361 So. 2d 989.

No. 78–6220. PITTS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 588 F. 2d 102.

No. 78–6222. WARRINGTON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 590 F. 2d 338.

No. 78–6243. SIMMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 559 F. 2d 28.

No. 78–6248. PETERS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 588 F. 2d 1353.

No. 78–6255. PARSELLS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 591 F. 2d 1337.

No. 78–6271. ZEIGLER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 595 F. 2d 1227.

No. 78–6288. BLACKBURN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 595 F. 2d 1226.

No. 78–6291. GOMEZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 593 F. 2d 210.

No. 78–6293. JOHNSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 573 F. 2d 1310.

No. 78–6300. FANNON ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 590 F. 2d 794.

No. 78–6315. HODGES ET AL. *v.* GOVERNMENT OF THE CANAL ZONE. C. A. 5th Cir. Certiorari denied. Reported below: 589 F. 2d 207.

No. 78–6376. LANTRIP *v.* ESTELLE, CORRECTIONS DIRECTOR, ET AL. C. A. 5th Cir. Certiorari denied.

No. 78–6381. WARDEN *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 224 Kan. 705, 585 P. 2d 1038.

No. 78–6385. ROBERTS *v.* JAGO, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 590 F. 2d 335.

No. 78–6393. MILES *v.* McCONKEY. Ct. App. D. C. Certiorari denied.

No. 78–6394. BALASSY *v.* COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT. C. A. 9th Cir. Certiorari denied.

No. 78–6395. BRADFORD *v.* DISTRICT OF COLUMBIA HACKER'S LICENSE APPEAL BOARD. Ct. App. D. C. Certiorari denied. Reported below: 396 A. 2d 988.

No. 78–6414. MAY *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 78–6415. TRAVISON *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 46 N. Y. 2d 758, 386 N. E. 2d 256.

No. 78–6416. HARRISON *v.* ILLINOIS ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 590 F. 2d 338.

No. 78–6417. GREEN *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 78–6421. VAN ORDEN *v.* ARIZONA BOARD OF PARDONS AND PAROLES. Sup. Ct. Ariz. Certiorari denied.

No. 78–6427. COLE *v.* QUICK, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 598 F. 2d 609.

No. 78–6430. SMITH *v.* SUPERINTENDENT, POWHATAN CORRECTIONAL CENTER. Sup. Ct. Va. Certiorari denied.

No. 78–6433. HERRERA *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 121 Ariz. 12, 588 P. 2d 305.

No. 78–6434. YOUNG, AKA CLOUDY *v.* CONN. Sup. Ct. Ind. Certiorari denied.

No. 78–6435. YOUNG, AKA CLOUDY *v.* INDIANA. Sup. Ct. Ind. Certiorari denied.

No. 78–6436. YOUNG, AKA CLOUDY *v.* GARRETTSON. Sup. Ct. Ind. Certiorari denied.

No. 78–6442. BROWN *v.* BARRY, MAYOR OF WASHINGTON, D. C., ET AL. Ct. App. D. C. Certiorari denied.

No. 78–6452. KINGSBURY *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 78–6494. MORTON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 591 F. 2d 483.

No. 78–6498. PEREZ-LOPEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 595 F. 2d 1230.

No. 78–6499. ROBINSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 591 F. 2d 1342.

No. 78–6501. FRANKLIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 589 F. 2d 192.

No. 78–6506. BATTLE *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY. C. A. 6th Cir. Certiorari denied.

No. 78–6507. MURRELL *v.* MCCARTER, TRUSTEE IN BANKRUPTCY. C. A. 8th Cir. Certiorari denied. Reported below: 588 F. 2d 1207.

No. 78–6510. GOFF *v.* HILTON, PRISON SUPERINTENDENT, ET AL. C. A. 3d Cir. Certiorari denied.

No. 78–6513. YOUNG BUFFALO, AKA ZAUNER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 591 F. 2d 506.

No. 78–6520. DAVIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 589 F. 2d 904.

No. 78–6522. DINSIO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 595 F. 2d 1229.

No. 78–6525. GONZALEZ *v.* UNITED STATES ET AL. C. A. 1st Cir. Certiorari denied.

No. 78–6533. DIXON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 592 F. 2d 329.

No. 78–6535. GORE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 594 F. 2d 905.

No. 78–6536. WOODALL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 591 F. 2d 1345.

No. 78–6539. IN RE A. O. S. Ct. App. D. C. Certiorari denied.

No. 78–6544. RODES *v.* PRISTO ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 61 Ill. App. 3d 599, 377 N. E. 2d 1190.

No. 78–6558. JONES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 592 F. 2d 1038.

No. 78–6559. BARRON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 594 F. 2d 1345.

No. 78–1068. PENNSYLVANIA *v.* FANT. Sup. Ct. Pa. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 480 Pa. 586, 391 A. 2d 1040.

No. 78–1072. FORD MOTOR CREDIT CO. *v.* EDMONDSON. C. A. 5th Cir. Motion of National Consumer Finance Assn. et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. MR. JUSTICE WHITE would grant certiorari. Reported below: 577 F. 2d 291.

No. 78–1113. ROSAS *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. MR. JUSTICE BRENNAN would grant certiorari.

No. 78–1214. P. P. G., INC., ET AL. *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Los Angeles. Certiorari denied. MR. JUSTICE BRENNAN would grant certiorari.

No. 78–1196. COUNTY OF THURSTON, NEBRASKA *v.* ANDRUS, SECRETARY OF THE INTERIOR, ET AL. C. A. 8th Cir. Certiorari denied. MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 586 F. 2d 1212.

No. 78–1270. MCDANIEL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE WHITE would grant certiorari. Reported below: 574 F. 2d 1224.

No. 78–1316. FLEX-A-LITE CORP. *v.* SCHWITZER DIVISION, WALLACE-MURRAY CORP. C. A. 7th Cir. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE WHITE would grant certiorari. Reported below: 588 F. 2d 835.

No. 78–1298. BAIRD ET AL. *v.* PRATT, COMMISSIONER, DEPARTMENT OF PUBLIC WELFARE OF MASSACHUSETTS; and

No. 78–1430. PRETERM, INC., ET AL. *v.* KING, GOVERNOR OF MASSACHUSETTS, ET AL. C. A. 1st Cir. Motions of Legal Defense Fund for Unborn Children for leave to file briefs as *amicus curiae* denied. Motions to appoint Alan Ernest as counsel for children unborn and born alive denied. Certiorari denied. Reported below: 591 F. 2d 121.

No. 78–1313. GATEWAY BOOKS, INC., ET AL. *v.* JACKSON, MAYOR OF ATLANTA, ET AL. Sup. Ct. Ga. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE STEWART would grant certiorari. Reported below: 242 Ga. 214, 248 S. E. 2d 623.

No. 78–1431. JOHNSON OIL CO., INC. *v.* MOUNTAIN FUEL SUPPLY CO. C. A. 10th Cir. Certiorari denied. MR. JUSTICE STEWART took no part in the consideration or decision of this petition. Reported below: 586 F. 2d 1375.

No. 78–6073. BILES *v.* WATKINS, CORRECTIONS COMMISSIONER. Sup. Ct. Miss. Certiorari denied.

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

Petitioner was convicted of capital felony murder under § 97–3–19 (2)(e) of the Mississippi Code of 1972: "The killing of a human being . . . [w]hen done with or without any design to effect death, by any person engaged in the commission of the crime of . . . kidnapping . . . ." The Mississippi Supreme Court reversed the felony-murder conviction, finding insufficient proof of the crime of kidnaping. *Biles* v. *State*, 338 So. 2d 1004 (1976), cert. denied, 431 U. S. 940 (1977). Nonetheless, on the ground that the evidence was sufficient to sustain a conviction for the "lesser included offense" of "simple" murder, the court affirmed as to guilt and remanded for resentencing. 338 So. 2d, at 1005. Simple murder is defined in relevant part under § 97–3–19 (1)(a) as "[t]he killing of a human being . . . [w]hen done with deliberate design to effect the death of the person killed . . . ." Petitioner subsequently filed a pleading in the Mississippi Supreme Court that was treated as a petition for writ of error *coram nobis* and was denied without written opinion. Petitioner here seeks a writ of certiorari to review that judgment.

Whatever the phrase "lesser included offense" may connote under Mississippi law, it is apparent from the relevant Mississippi statutes that capital murder may be committed "without any design to effect death," while simple murder requires "a deliberate design to effect . . . death." Although overturning petitioner's conviction for capital murder, the Mississippi Supreme Court, finding evidence of the necessary intent to kill, found petitioner guilty of simple murder and to this extent affirmed the conviction. Petitioner, however, was not tried by the jury for simple murder, and the judgment of the Mississippi court would appear infirm under *Cole* v. *Arkansas*,

333 U. S. 196, 201 (1948), where the Court held that "[i]t is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made." [1] Further, the right to a jury trial is rendered nugatory where an appellate court overturns the verdict on the only offense found by the jury to have been committed and imposes a conviction for an offense that includes an essential element not necessarily found by the jury. On the basis of the statutory definitions of the crimes involved, it appears that exactly that might have happened here.

It is true as the State contends that regardless of what the statutes say, the trial court, though it refused to give a direct simple-murder instruction, incorporated that instruction in one of its capital felony-murder instructions.[2] Another capital

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[1] In *Presnell* v. *Georgia*, 439 U. S. 14 (1978), we recently dealt with a somewhat similar situation. The State Supreme Court in that case had upheld the jury's imposition of the death penalty on the ground that the killing in question occurred while Presnell was engaged in the commission of the offense of kidnaping with bodily injury. This conclusion was based on the court's belief that there was sufficient evidence of forcible rape, which established the element of bodily harm. Because the jury had not based its penalty determination on this theory and had not made the key finding of forcible rape, we found that "fundamental principles of procedural fairness" had been violated, even though the indictment charged forcible rape and the jury was instructed on it. *Id.*, at 16. That case is quite similar to this in that the jury returned a verdict of guilty of "rape," but that verdict was an unreliable indication of a finding of forcible rape because the jury had also been instructed on statutory rape. *Id.*, at 15 n. 1.

[2] Instruction 2–S stated:

"The Court instructs the jury that murder is the killing of a human being, without authority of law, by any means, or in any manner, when done with a deliberate design to effect the death of the person killed, and that if you believe from the evidence in this case beyond a reasonable doubt that the defendant did on or about the 18th day of February, 1975 unlawfully, wilfully, feloniously and of his malice aforethought, then and

felony-murder instruction,[3] however, permitted guilt to be found if petitioner acted "either with or without deliberate design or intent [to] shoot, kill and murder . . . ." The State argues that even under the latter instruction, when considered as a whole, the jury would have realized that all the elements of simple murder had to be found. But it appears just as likely that when the jury convicted of capital murder, it heeded the direction that it could do so even if petitioner acted "without deliberate design or intent," and there is no way to know which course the jury followed. One course, however, would mean that the State Supreme Court's action was constitutionally forbidden, and in these circumstances the conviction cannot stand. See *Eaton* v. *Tulsa*, 415 U. S. 697, 699 n. (1974); *Williams* v. *North Carolina*, 317 U. S. 287, 291–

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there, kill and murder one Henry Muller a human being, while he, the said Billy Glen Biles, was, then and there, engaged in the commission of kidnapping the said Henry Muller, by forcing the said Henry Muller to drive him the said Billy Glen Biles, at gun point, and do his bidding, then in that event, the defendant, Billy Glen Biles, is Guilty of Capital Murder, and it shall be your sworn duty to find the defendant guilty of Capital Murder."

[3] Instruction 5–S stated:

"The court instructs the jury that Capital Murder is the killing of a human being without authority of law, by any means or in any manner when done with, or without a deliberate design or intent to effect the death of the person killed, when said killing is done while engaged in the perpetration or commission of the crime of kidnapping. Therefore, the court further, instructs the jury that if you believe from the evidence in this case, beyond a reasonable doubt that the defendant, Billy Glen Biles, on the 18th day of February 1975, in Jackson County, Mississippi did unlawfully, wilfully and feloniously, with a design to kidnap Henry Muller, force the said Henry Muller to drive him and do his bidding, and while so engaged in kidnapping the said Henry Muller, the said Billy Glen Biles, did wilfully, unlawfully, feloniously and of his malice aforethought, either with or without deliberate design or intent, shoot, kill and murder the said Henry Muller, a human being, then in that event, it shall be your sworn duty to find the defendant guilty of capital murder."

292 (1942); *Stromberg* v. *California*, 283 U. S. 359, 367–368 (1931).

Accordingly, I dissent from denial of the petition for certiorari.

No. 78–6225. VOYLES *v.* MISSISSIPPI. Sup. Ct. Miss.; and No. 78–6371. SONGER *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: No. 78–6225, 362 So. 2d 1236; No. 78–6371, 365 So. 2d 696.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 78–6429. HARVARD *v.* FLORIDA. Sup. Ct. Fla. Motion of petitioner to defer consideration of petition for writ of certiorari and certiorari denied.

Rehearing Denied

No. 77–1444. JOHNSON *v.* ABRAMS, ATTORNEY GENERAL OF NEW YORK, ET AL., 440 U. S. 945;

No. 77–1618. LEIS ET AL. *v.* FLYNT ET AL., 439 U. S. 438;

No. 78–1026. KLINGAMAN, T/A BANNER SIGHTSEEING CO., ET AL. *v.* SOMMERS, 440 U. S. 959;

No. 78–1034. EVANS *v.* ANDREJKO ET AL., 440 U. S. 916;

No. 78–1047. HORVAT ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE, 440 U. S. 959;

No. 78–1180. ROSENTHAL *v.* ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF ILLINOIS, 440 U. S. 961;

No. 78–1193. CARNOW *v.* ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF ILLINOIS, 440 U. S. 961; and

No. 78–5844. FARRELL *v.* JOHNSON, 440 U. S. 952. Petitions for rehearing denied. MR. JUSTICE POWELL took no part in the consideration or decision of these petitions.

No. 78–1188. SPICKLER *v.* BRENGELMANN ET UX., 440 U. S. 971;

No. 78–1225. ETKES *v.* BARTELL MEDIA CORP. ET AL., 440 U. S. 978;

No. 78–5916. VEAL *v.* ILLINOIS, *ante*, p. 908;

No. 78–6089. BLANTON *v.* ENGLE, CORRECTIONAL SUPERINTENDENT, ET AL., 440 U. S. 979;

No. 78–6143. JAWA *v.* FAYETTEVILLE STATE UNIVERSITY ET AL., 440 U. S. 974;

No. 78–6169. HOHENSEE *v.* SPADINE, 440 U. S. 974;

No. 78–6190. DELESPINE *v.* ESTELLE, CORRECTIONS DIRECTOR, 440 U. S. 984;

No. 78–6192. WOOD *v.* JEFFES, CORRECTIONAL SUPERINTENDENT, ET AL., 440 U. S. 984;

No. 78–6290. ROWAN *v.* UNITED STATES, 440 U. S. 976; and

No. 78–6348. GORDON *v.* UNITED STATES, *ante*, p. 912. Petitions for rehearing denied. MR. JUSTICE POWELL took no part in the consideration or decision of these petitions.

No. 78–5535. BODDE *v.* TEXAS, 440 U. S. 968. Motion for leave to file petition for rehearing denied.

MAY 17, 1979

Dismissal Under Rule 60

No. 78–1400. COWLES BROADCASTING, INC., ET AL. *v.* CENTRAL FLORIDA ENTERPRISES, INC., ET AL. C. A. D. C. Cir. Certiorari dismissed under this Court's Rule 60.

MAY 21, 1979

Dismissal Under Rule 60

No. 78–1300. GENERAL WAREHOUSEMEN & HELPERS LOCAL 767 *v.* STANDARD BRANDS, INC. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 60. Reported below: 579 F. 2d 1282.

Appeal Dismissed

No. 78–1314. SPENCER *v.* SPENCER. Appeal from Ct. App. N. C. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 37 N. C. App. 481, 246 S. E. 2d 805.

Miscellaneous Orders

No. A–946. BENEFIELD *v.* FLORIDA. Application to continue stay of mandate of the Supreme Court of Florida, addressed to MR. JUSTICE MARSHALL and referred to the Court, denied.

No. A–949 (78–6620). CARDILLO *v.* UNITED STATES PAROLE COMMISSION ET AL. C. A. 3d Cir. Application for release from custody, addressed to MR. JUSTICE STEWART and referred to the Court, denied.

No. A–957. BEHNKE *v.* COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF IOWA STATE BAR ASSN. Sup. Ct. Iowa. Application for stay of disciplinary sentence, presented to MR. JUSTICE BLACKMUN, and by him referred to the Court, denied. MR. JUSTICE BLACKMUN would grant the application.

No. A–970. HAYNIE *v.* UNITED STATES. C. A. 4th Cir. Application for bail pending appeal, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied.

No. A–995. GOMES *v.* RHODE ISLAND INTERSCHOLASTIC LEAGUE ET AL. Application to vacate stay entered by the United States Court of Appeals for the First Circuit, presented to MR. JUSTICE BRENNAN, and by him referred to the Court, denied.

No. D–137. IN RE DISBARMENT OF GILBERT. Disbarment entered. [For earlier order herein, see 439 U. S. 905.]

No. D–156. IN RE DISBARMENT OF FALK. Disbarment entered. [For earlier order herein, see 439 U. S. 1124.]

No. D–163. IN RE DISBARMENT OF REEDY. James Phillip Reedy, of Pompano Beach, Fla., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on April 23, 1979 [*ante*, p. 919], is hereby discharged.

No. 78, Orig. CALIFORNIA *v.* ARIZONA ET AL. It is ordered that Honorable Roy W. Harper, Senior Judge for the United States District Court for the Eastern and Western Districts of Missouri, be appointed Special Master in this case with authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem necessary to call for. The Master is directed to submit such reports as he may deem appropriate.

The Master shall be allowed his actual expenses. The allowances to him, the compensation paid to his technical, stenographic and clerical assistants, the cost of printing his report, and all other proper expenses shall be charged against and be borne by the parties in such proportion as the Court may hereafter direct.

It is further ordered that if the position of Special Master in this case becomes vacant during a recess of the Court, THE CHIEF JUSTICE shall have authority to make a new designation which shall have the same effect as if originally made by the Court. [For earlier order herein, see 439 U. S. 812.]

No. 77–1511. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* YAMASAKI ET AL. C. A. 9th Cir. [Certiorari granted, 439 U. S. 816.] Motion for leave to substitute Nancy Yamasaki in place of Evelyn Elliott, deceased, as a party respondent, granted.

No. 78–1155. VITEK, CORRECTIONAL DIRECTOR, ET AL. *v.* JONES. D. C. Neb. [Probable jurisdiction postponed, *ante*, p. 922.] Motion for appointment of counsel granted, and it is ordered that Thomas A. Wurtz, Esquire, of Lincoln, Neb., be appointed to serve as counsel for appellee in this case.

No. 78–6595. NICHOLAS *v.* FENTON, WARDEN, ET AL. Motion for leave to file petition for writ of habeas corpus denied.

Probable Jurisdiction Noted or Postponed

No. 78–1268. MARTINEZ ET AL. *v.* CALIFORNIA ET AL. Appeal from Ct. App. Cal., 4th App. Dist. Probable jurisdiction noted. Reported below: 85 Cal. App. 3d 430, 149 Cal. Rptr. 519.

No. 78–1513. UNITED STATES *v.* CLARK, GUARDIAN. Appeal from Ct. Cl. Further consideration of question of jurisdiction postponed to hearing of case on the merits. Reported below: — Ct. Cl. —, 590 F. 2d 343.

Certiorari Granted

No. 78–1007. FULLILOVE ET AL. *v.* KREPS, SECRETARY OF COMMERCE, ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 584 F. 2d 600.

No. 78–6386. RUMMEL *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 587 F. 2d 651.

Certiorari Denied. (See also No. 78–1314, *supra.*)

No. 77–6443. KRAEMER *v.* MENTAL HEALTH BOARD OF NEBRASKA ET AL. Sup. Ct. Neb. Certiorari denied. Reported below: 199 Neb. 785, 261 N. W. 2d 626.

No. 78–1279. ARABIAN ET AL. *v.* DALEY ET AL. C. A. 1st Cir. Certiorari denied.

No. 78–1341. WALLS *v.* TUBBS. C. A. 5th Cir. Certiorari denied. Reported below: 582 F. 2d 39.

No. 78–1319. SOUTH DAKOTA *v.* ADAMS, SECRETARY OF TRANSPORTATION, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 587 F. 2d 915.

No. 78–1342. BLACKBURN ET AL. *v.* MINOR. C. A. 5th Cir. Certiorari denied. Reported below: 582 F. 2d 39.

No. 78–1365. HOUGH ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 586 F. 2d 841.

No. 78–1384. PROESEL ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 585 F. 2d 295.

No. 78–1389. DYAR *v.* UNITED STATES; and
No. 78–1415. HALL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 587 F. 2d 177.

No. 78–1406. MCCARTHY ET UX. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 590 F. 2d 336.

No. 78–1429. COSTANZO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 591 F. 2d 1337.

No. 78–1475. PENCE *v.* BROWN, SECRETARY OF DEFENSE, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 590 F. 2d 335.

No. 78–1478. JAFFEE ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 592 F. 2d 712.

No. 78–1481. GOOD GOVERNMENT GROUP OF SEAL BEACH, INC., ET AL. *v.* HOGARD. Sup. Ct. Cal. Certiorari denied. Reported below: 22 Cal. 3d 672, 586 P. 2d 572.

No. 78–1488. BRADFORD COAL CO., INC. *v.* BAUGHMAN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 592 F. 2d 215.

No. 78–1489. MCNULTY *v.* HAWAII. Sup. Ct. Hawaii. Certiorari denied. Reported below: 60 Haw. 259, 588 P. 2d 438.

No. 78–1507. RICKMAN *v.* MODERN AMERICAN MORTGAGE CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 583 F. 2d 155.

No. 78–1509. KARABATSOS *v.* VANDER ZEE. C. A. D. C. Cir. Certiorari denied. Reported below: 191 U. S. App. D. C. 200, 589 F. 2d 723.

No. 78–1510. BINDER *v.* OFFICIAL CREDITORS' COMMITTEE. C. A. 2d Cir. Certiorari denied. Reported below: 595 F. 2d 1208.

No. 78–1511. MURPHY ET AL. *v.* BOARD OF EDUCATION OF THE CITY OF ST. LOUIS ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 594 F. 2d 869.

No. 78–1530. MILLER ET AL. *v.* FEDERAL LAND BANK OF SPOKANE. C. A. 9th Cir. Certiorari denied. Reported below: 587 F. 2d 415.

No. 78–1624. ANDREWS ET AL. *v.* UNITED STATES;
No. 78–6568. HALL *v.* UNITED STATES; and
No. 78–6579. MARTIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 599 F. 2d 880.

No. 78–1641. PARKER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 586 F. 2d 422.

No. 78–6144. MITCHELL *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 586 F. 2d 840.

No. 78–6204. CLAYTON *v.* UNITED STATES; and
No. 78–6304. DAVIS ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 582 F. 2d 947.

No. 78–6218. OLIPHANT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 594 F. 2d 853.

No. 78–6235. BARKSDALE *v.* SIELAFF. C. A. 7th Cir. Certiorari denied. Reported below: 585 F. 2d 288.

No. 78–6205. RAICEVICH *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 61 Ill. App. 3d 143, 377 N. E. 2d 1266.

No. 78–6240. CARNEY *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 78–6260. ORDONEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 588 F. 2d 448.

No. 78–6308. RECTOR *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 538 F. 2d 223.

No. 78–6330. VELEZ *v.* SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 1st Cir. Certiorari denied. Reported below: 588 F. 2d 818.

No. 78–6340. NEISWENDER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 590 F. 2d 1269.

No. 78–6349. JONES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 594 F. 2d 243.

No. 78-6350. SREMANIAK *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 218 Ct. Cl. 746, 590 F. 2d 344.

No. 78–6354. POTESTIO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 594 F. 2d 853.

No. 78–6356. FIELDS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 191 U. S. App. D. C. 213, 589 F. 2d 1116.

No. 78–6379. HOWE ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 591 F. 2d 454.

No. 78–6418. BLOETH *v.* HENDERSON, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 78–6440. HENDRICKS *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 360 So. 2d 1119.

No. 78–6444. SMITH *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 224 Kan. 662, 585 P. 2d 1006; 225 Kan. 199, 588 P. 2d 953.

No. 78–6445. LINEBARGER *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 78–6446. JENNINGS, AKA ABDULLAH *v.* OKLAHOMA ET AL. Ct. Crim. App. Okla. Certiorari denied.

No. 78–6449. WEBB *v.* BALSON, STATE HOSPITAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 595 F. 2d 1227.

No. 78–6451. REEVES *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 264 Ark. 622, 574 S. W. 2d 647.

No. 78–6453. DAVIS *v.* BROWN. Sup. Ct. Fla. Certiorari denied. Reported below: 366 So. 2d 411.

No. 78–6455. VAN CLIFF *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 483 Pa. 576, 397 A. 2d 1173.

No. 78–6461. PLEASANT *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 78–6463. CARTER *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 296 N. C. 344, 250 S. E. 2d 263.

No. 78–6470. WILLS ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 593 F. 2d 285.

No. 78–6475. HAUGHEY *v.* NEW YORK STATE BOARD OF LAW EXAMINERS. Ct. App. N. Y. Certiorari denied.

No. 78–6519. MONTEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 78–6534. WASHINGTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 595 F. 2d 1230.

No. 78–6552. SEMAAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 594 F. 2d 1215.

No. 78–6560. WATSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 591 F. 2d 1058.

No. 78–6562. SOTO-CAMARENA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 595 F. 2d 1230.

No. 78–6563. HUFAULT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 603 F. 2d 216.

No. 78–6570. WESSON ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 595 F. 2d 1227.

No. 78–6573. SHEFFIELD *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 397 A. 2d 963.

No. 78–6574. PERKINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 588 F. 2d 1100.

No. 78–6578. BARTLETT *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 78–6583. LIZARRAGA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 596 F. 2d 824.

No. 78–6584. BOGGS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 595 F. 2d 1229.

No. 78–1172. TORMEY ET AL. *v.* DE LA CRUZ ET AL. C. A. 9th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Motion of respondents to add parties or, in the alternative, motion of Mary Evans et al. for leave to intervene denied. Certiorari denied. Reported below: 582 F. 2d 45.

No. 78–6588. HELTON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 601 F. 2d 594.

No. 78–6590. HOWELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 594 F. 2d 240.

No. 78–1237. CROATAN BOOKS, INC. *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL would grant certiorari and reverse the conviction.

No. 78–1238. CROATAN BOOKS, INC. *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL would grant certiorari and reverse the conviction.

No. 78–1271. NORTH CAROLINA *v.* ASHE ET AL. C. A. 4th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 586 F. 2d 334.

No. 78–1343. BEAUBOUEF ET AL. *v.* MITCHELL ET AL. C. A. 5th Cir. Motion of respondent Arthur Mitchell for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 581 F. 2d 412.

No. 78–1380. PEARY, AKA PEAY *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 176 Conn. 170, 405 A. 2d 626.

MR. JUSTICE MARSHALL, dissenting.

Petitioner challenges the admission into evidence of a partially masked mug shot. In my view, displaying to the jury a mug shot of a criminal defendant creates the same potential for prejudice as forcing him to stand trial in prison attire. See *Estelle* v. *Williams*, 425 U. S. 501, 503–506 (1976). Particularly since the Connecticut Supreme Court conceded that the mug shot of petitioner was of "limited probative value," its use at trial raises substantial questions under the Sixth and

Fourteenth Amendments. Accordingly, I would grant certiorari and set the case for argument.

No. 78–1438. ILLINOIS OFFICE OF EDUCATION *v.* JENNINGS. C. A. 7th Cir. Certiorari denied. MR. JUSTICE POWELL would grant certiorari. Reported below: 589 F. 2d 935.

No. 78–1466. PLY*GEM INDUSTRIES, INC., ET AL. *v.* JOHN M. LEE, INC., ET AL. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE WHITE would grant certiorari. Reported below: 193 U. S. App. D. C. 112, 593 F. 2d 1266.

No. 78–6140. MORGAN *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. MR. JUSTICE MARSHALL would grant certiorari and set the case for oral argument. Reported below: 241 Ga. 485, 246 S. E. 2d 198.

MR. JUSTICE BRENNAN, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia,* 428 U. S. 153, 227 (1976), I would grant certiorari and vacate the death sentence in this case.

No. 78–6223. VON BYRD *v.* TEXAS. Ct. Crim. App. Tex.;
No. 78–6275. BERRYHILL *v.* ZANT, WARDEN. Sup. Ct. Ga.;
No. 78–6310. SMITH *v.* VIRGINIA. Sup. Ct. Va.; and
No. 78–6443. GOODE *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: No. 78–6223, 569 S. W. 2d 883; No. 78–6275, 242 Ga. 447, 249 S. E. 2d 197; No. 78–6310, 219 Va. 455, 248 S. E. 2d 135; No. 78–6443, 365 So. 2d 381.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia,* 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 78–1496. LOCAL 13000, UNITED STEELWORKERS OF AMERICA, AFL–CIO–CLC *v.* PARSON ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration of this petition. Reported below: 575 F. 2d 1374 and 583 F. 2d 132.

Rehearing Denied

No. 77–1833. SUN OIL COMPANY OF PENNSYLVANIA *v.* UNEMPLOYMENT COMPENSATION BOARD OF REVIEW OF PENNSYLVANIA ET AL., 440 U. S. 977;

No. 78–1216. BRITISH AIRWAYS BOARD *v.* BOEING CO., 440 U. S. 981; and

No. 78–6289. CZORNONOH *v.* UNITED STATES SECRET SERVICE; and CZORNONOH *v.* STALLARD ET AL., *ante*, p. 912. Petitions for rehearing denied. MR. JUSTICE POWELL took no part in the consideration or decision of these petitions.

AMENDMENTS TO FEDERAL RULES OF APPELLATE PROCEDURE

The following amendments to the Federal Rules of Appellate Procedure were prescribed by the Supreme Court of the United States on April 30, 1979, pursuant to 18 U. S. C. § 3772 and 28 U. S. C. §§ 2072 and 2075, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 970. The Judicial Conference Reports referred to in that letter are not reproduced herein.

Note that under 28 U. S. C. §§ 2072 and 2075, such amendments do not take effect until so reported to Congress and until the expiration of 90 days thereafter. Moreover, Congress may defer the effective date to a later date or until approved by Act of Congress, or may modify such amendments.

For earlier publication of the Federal Rules of Appellate Procedure and the amendments thereto, see 389 U. S. 1063, 398 U. S. 971, 401 U. S. 1029, and 406 U. S. 1005.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 30, 1979

To the Senate and House of Representatives of the United States of America in Congress Assembled:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress amendments to the Federal Rules of Appellate Procedure prescribed pursuant to Section 3772 of Title 18, United States Code, and Sections 2072 and 2075 of Title 28, United States Code;

Amendments to the Federal Rules of Criminal Procedure prescribed pursuant to Sections 3771 and 3772 of Title 18, United States Code;

Amendments to the Rules Governing Proceedings in the United States District Courts under Sections 2254 and 2255 of Title 28, United States Code; and

An amendment to the Federal Rules of Evidence prescribed pursuant to Section 2076 of Title 28, United States Code.

Accompanying these rules are excerpts from the Reports of the Judicial Conference of the United States containing the Advisory Committee notes which were submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Respectfully,

(Signed) WARREN E. BURGER
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

MONDAY, APRIL 30, 1979

ORDERED:

1. That the Federal Rules of Appellate Procedure be, and they hereby are, amended by including therein amendments to Rules 1 (a), 3 (c), (d) and (e), 4 (a), 5 (d), 6 (d), 7, 10 (b), 11 (a), (b), (c) and (d), 12, 13 (a), 24 (b), 27 (b), 28 (g) and (j), 34 (a) and (b), 35 (b) and (c), 39 (c) and (d), and 40 as hereinafter set forth:

[See *infra*, pp. 973–984.]

2. That the foregoing amendments to the Federal Rules of Appellate Procedure shall take effect on August 1, 1979, and shall govern all appellate proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Appellate Procedure in accordance with the provisions of Section 3772 of Title 18, United States Code, and Sections 2072 and 2075 of Title 28, United States Code.

AMENDMENTS TO FEDERAL RULES OF APPELLATE PROCEDURE

Rule 1. Scope of rules.

(*a*) *Scope of rules.*—These rules govern procedure in appeals to United States courts of appeals from the United States district courts and the United States Tax Court; in proceedings in the courts of appeals for review or enforcement of orders of administrative agencies, boards, commissions and officers of the United States; and in applications for writs or other relief which a court of appeals or a judge thereof is competent to give. When these rules provide for the making of a motion or application in the district court, the procedure for making such motion or application shall be in accordance with the practice of the district court.

. . . . .

Rule 3. Appeal as of right—how taken.

. . . . .

(*c*) *Content of the notice of appeal.*—The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal. An appeal shall not be dismissed for informality of form or title of the notice of appeal.

(*d*) *Service of the notice of appeal.*—The clerk of the district court shall serve notice of the filing of a notice of appeal by mailing a copy thereof to counsel of record of each party other than the appellant, or, if a party is not represented by counsel, to the party at his last known address; and the clerk shall transmit forthwith a copy of the notice of appeal and of the docket entries to the clerk of the court of appeals named in the notice. When an appeal is taken by a defend-

ant in a criminal case, the clerk shall also serve a copy of the notice of appeal upon him, either by personal service or by mail addressed to him. The clerk shall note on each copy served the date on which the notice of appeal was filed. Failure of the clerk to serve notice shall not affect the validity of the appeal. Service shall be sufficient notwithstanding the death of a party or his counsel. The clerk shall note in the docket the names of the parties to whom he mails copies, with the date of mailing.

(*e*) *Payment of fees.*—Upon the filing of any separate or joint notice of appeal from the district court, the appellant shall pay to the clerk of the district court such fees as are established by statute, and also the docket fee prescribed by the Judicial Conference of the United States, the latter to be received by the clerk of the district court on behalf of the court of appeals.

Rule 4. Appeal as of right—when taken.

(*a*) *Appeals in civil cases.*

(1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.

(2) Except as provided in (a)(4) of this Rule 4, a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof.

(3) If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after

the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this Rule 4 (a), whichever period last expires.

(4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50 (b); (ii) under Rule 52 (b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

(5) The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4 (a). Any such motion which is filed before expiration of the prescribed time may be *ex parte* unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

(6) A judgment or order is entered within the meaning of this Rule 4 (a) when it is entered in compliance with Rules 58 and 79 (a) of the Federal Rules of Civil Procedure.

. . . . .

Rule 5. Appeals by permission under 28 U. S. C. § 1292 (b).

. . . . .

(*d*) *Grant of permission; cost bond; filing of record.*— Within 10 days after the entry of an order granting permission

to appeal the appellant shall (1) pay to the clerk of the district court the fees established by statute and the docket fee prescribed by the Judicial Conference of the United States and (2) file a bond for costs if required pursuant to Rule 7. The clerk of the district court shall notify the clerk of the court of appeals of the payment of the fees. Upon receipt of such notice the clerk of the court of appeals shall enter the appeal upon the docket. The record shall be transmitted and filed in accordance with Rules 11 and 12 (b). A notice of appeal need not be filed.

Rule 6. Appeals by allowance in bankruptcy proceedings.

. . . . .

(*d*) *Allowance of the appeal; fees; cost bond; filing of record.*—Within 10 days after the entry of an order granting permission to appeal the appellant shall (1) pay to the clerk of the district court the fees established by statute and the docket fee prescribed by the Judicial Conference of the United States and (2) file a bond for costs if required pursuant to Rule 7. The clerk of the district court shall notify the clerk of the court of appeals of the payment of the fees. Upon receipt of such notice the clerk of the court of appeals shall enter the appeal upon the docket. The record shall be transmitted and filed in accordance with Rules 11 and 12 (b). A notice of appeal need not be filed.

Rule 7. Bond for costs on appeal in civil cases.

The district court may require an appellant to file a bond or provide other security in such form and amount as it finds necessary to ensure payment of costs on appeal in a civil case. The provisions of Rule 8 (b) apply to a surety upon a bond given pursuant to this rule.

Rule 10. The record on appeal.

. . . . .

(*b*) *The transcript of proceedings; duty of appellant to order; notice to appellee if partial transcript is ordered.*

(1) Within 10 days after filing the notice of appeal the

appellant shall order from the reporter a transcript of such parts of the proceedings not already on file as he deems necessary, subject to local rules of the courts of appeals. The order shall be in writing and within the same period a copy shall be filed with the clerk of the district court. If funding is to come from the United States under the Criminal Justice Act, the order shall so state. If no such parts of the proceedings are to be ordered, within the same period the appellant shall file a certificate to that effect.

(2) If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, he shall include in the record a transcript of all evidence relevant to such finding or conclusion.

(3) Unless the entire transcript is to be included, the appellant shall, within the 10 days time provided in (b)(1) of this Rule 10, file a statement of the issues he intends to present on the appeal and shall serve on the appellee a copy of the order or certificate and of the statement. If the appellee deems a transcript of other parts of the proceedings to be necessary, he shall, within 10 days after the service of the order or certificate and the statement of the appellant, file and serve on the appellant a designation of additional parts to be included. Unless within 10 days after service of such designation the appellant has ordered such parts, and has so notified the appellee, the appellee may within the following 10 days either order the parts or move in the district court for an order requiring the appellant to do so.

(4) At the time of ordering, a party must make satisfactory arrangements with the reporter for payment of the cost of the transcript.

. . . . .

Rule 11. Transmission of the record.

(*a*) *Duty of appellant.*—After filing the notice of appeal the appellant, or in the event that more than one appeal is taken, each appellant, shall comply with the provisions of Rule 10 (b) and shall take any other action necessary to

enable the clerk to assemble and transmit the record. A single record shall be transmitted.

(*b*) *Duty of reporter to prepare and file transcript; notice to court of appeals; duty of clerk to transmit the record.*—Upon receipt of an order for a transcript, the reporter shall acknowledge at the foot of the order the fact that he has received it and the date on which he expects to have the transcript completed and shall transmit the order, so endorsed, to the clerk of the court of appeals. If the transcript cannot be completed within 30 days of receipt of the order the reporter shall request an extension of time from the clerk of the court of appeals and the action of the clerk of the court of appeals shall be entered on the docket and the parties notified. In the event of the failure of the reporter to file the transcript within the time allowed, the clerk of the court of appeals shall notify the district judge and take such other steps as may be directed by the court of appeals. Upon completion of the transcript the reporter shall file it with the clerk of the district court and shall notify the clerk of the court of appeals that he has done so.

When the record is complete for purposes of the appeal, the clerk of the district court shall transmit it forthwith to the clerk of the court of appeals. The clerk of the district court shall number the documents comprising the record and shall transmit with the record a list of documents correspondingly numbered and identified with reasonable definiteness. Documents of unusual bulk or weight, physical exhibits other than documents, and such other parts of the record as the court of appeals may designate by local rule, shall not be transmitted by the clerk unless he is directed to do so by a party or by the clerk of the court of appeals. A party must make advance arrangements with the clerks for the transportation and receipt of exhibits of unusual bulk or weight.

(*c*) *Temporary retention of record in district court for use in preparing appellate papers.*—Notwithstanding the provisions of (a) and (b) of this Rule 11, the parties may stipulate, or the district court on motion of any party may order, that the clerk of the district court shall temporarily retain the

record for use by the parties in preparing appellate papers. In that event the clerk of the district court shall certify to the clerk of the court of appeals that the record, including the transcript or parts thereof designated for inclusion and all necessary exhibits, is complete for purposes of the appeal. Upon receipt of the brief of the appellee, or at such earlier time as the parties may agree or the court may order, the appellant shall request the clerk of the district court to transmit the record.

(*d*) [*Extension of time for transmission of the record; reduction of time.*] [*Abrogated*]

. . . . .

Rule 12. Docketing the appeal; filing of the record.

(*a*) *Docketing the appeal.*—Upon receipt of the copy of the notice of appeal and of the docket entries, transmitted by the clerk of the district court pursuant to Rule 3 (d), the clerk of the court of appeals shall thereupon enter the appeal upon the docket. An appeal shall be docketed under the title given to the action in the district court, with the appellant identified as such, but if such title does not contain the name of the appellant, his name, identified as appellant, shall be added to the title.

(*b*) *Filing the record, partial record, or certificate.*—Upon receipt of the record transmitted pursuant to Rule 11 (b), or the partial record transmitted pursuant to Rule 11 (e), (f), or (g), or the clerk's certificate under Rule 11 (c), the clerk of the court of appeals shall file it and shall immediately give notice to all parties of the date on which it was filed.

(*c*) [*Dismissal for failure of appellant to cause timely transmission or to docket appeal.*] [*Abrogated*]

Title III. Review of Decisions of the United States Tax Court

Rule 13. Review of decisions of the Tax Court.

(*a*) *How obtained; time for filing notice of appeal.*—Review of a decision of the United States Tax Court shall be obtained

by filing a notice of appeal with the clerk of the Tax Court within 90 days after the decision of the Tax Court is entered. If a timely notice of appeal is filed by one party, any other party may take an appeal by filing a notice of appeal within 120 days after the decision of the Tax Court is entered.

The running of the time for appeal is terminated as to all parties by a timely motion to vacate or revise a decision made pursuant to the Rules of Practice of the Tax Court. The full time for appeal commences to run and is to be computed from the entry of an order disposing of such motion, or from the entry of decision, whichever is later.

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Rule 24. Proceedings in forma pauperis.

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(*b*) *Leave to proceed on appeal or review in forma pauperis in administrative agency proceedings.*—A party to a proceeding before an administrative agency, board, commission or officer (including, for the purpose of this rule, the United States Tax Court) who desires to proceed on appeal or review in a court of appeals in forma pauperis, when such appeal or review may be had directly in a court of appeals, shall file in the court of appeals a motion for leave so to proceed, together with the affidavit prescribed by the first paragraph of (a) of this Rule 24.

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Rule 27. Motions.

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(*b*) *Determination of motions for procedural orders.*—Notwithstanding the provisions of (a) of this Rule 27 as to motions generally, motions for procedural orders, including any motion under Rule 26 (b), may be acted upon at any time, without awaiting a response thereto, and pursuant to rule or order of the court, motions for specified types of procedural orders may be disposed of by the clerk. Any party adversely affected by such action may by application to the

court request consideration, vacation or modification of such action.

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Rule 28. Briefs.

. . . . .

(*g*) *Length of briefs.*—Except by permission of the court, or as specified by local rule of the court of appeals, principal briefs shall not exceed 50 pages, and reply briefs shall not exceed 25 pages, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, etc.

. . . . .

(*j*) *Citation of supplemental authorities.*—When pertinent and significant authorities come to the attention of a party after his brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk of the court, by letter, with a copy to all counsel, setting forth the citations. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall without argument state the reasons for the supplemental citations. Any response shall be made promptly and shall be similarly limited.

Rule 34. Oral argument.

(*a*) *In general; local rule.*—Oral argument shall be allowed in all cases unless pursuant to local rule a panel of three judges, after examination of the briefs and record, shall be unanimously of the opinion that oral argument is not needed. Any such local rule shall provide any party with an opportunity to file a statement setting forth the reasons why, in his opinion, oral argument should be heard. A general statement of the criteria employed in the administration of such local rule shall be published in or with the rule and such criteria shall conform substantially to the following minimum standard:

Oral argument will be allowed unless

(1) the appeal is frivolous; or

(2) the dispositive issue or set of issues has been recently authoritatively decided; or

(3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

(*b*) *Notice of argument; postponement.*—The clerk shall advise all parties whether oral argument is to be heard, and if so, of the time and place therefor, and the time to be allowed each side. A request for postponement of the argument or for allowance of additional time must be made by motion filed reasonably in advance of the date fixed for hearing.

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Rule 35. Determination of causes by the court in banc.

. . . . .

(*b*) *Suggestion of a party for hearing or rehearing in banc.*—A party may suggest the appropriateness of a hearing or rehearing in banc. No response shall be filed unless the court shall so order. The clerk shall transmit any such suggestion to the members of the panel and the judges of the court who are in regular active service but a vote need not be taken to determine whether the cause shall be heard or reheard in banc unless a judge in regular active service or a judge who was a member of the panel that rendered a decision sought to be reheard requests a vote on such a suggestion made by a party.

(*c*) *Time for suggestion of a party for hearing or rehearing in banc; suggestion does not stay mandate.*—If a party desires to suggest that an appeal be heard initially in banc, the suggestion must be made by the date on which the appellee's brief is filed. A suggestion for a rehearing in banc must be made within the time prescribed by Rule 40 for filing a petition for rehearing, whether the suggestion is made in such petition or otherwise. The pendency of such a suggestion whether or not included in a petition for rehearing shall not affect the finality of the judgment of the court of appeals or stay the issuance of the mandate.

Rule 39. Costs.

. . . . .

(c) *Costs of briefs, appendices, and copies of records.*—Unless otherwise provided by local rule, the cost of printing, or otherwise producing necessary copies of briefs, appendices, and copies of records authorized by Rule 30 (f) shall be taxable in the court of appeals at rates not higher than those generally charged for such work in the area where the clerk's office is located.

(d) *Bill of costs; objections; costs to be inserted in mandate or added later.*—A party who desires such costs to be taxed shall state them in an itemized and verified bill of costs which he shall file with the clerk, with proof of service, within 14 days after the entry of judgment. Objections to the bill of costs must be filed within 10 days of service on the party against whom costs are to be taxed unless the time is extended by the court. The clerk shall prepare and certify an itemized statement of costs taxed in the court of appeals for insertion in the mandate, but the issuance of the mandate shall not be delayed for taxation of costs and if the mandate has been issued before final determination of costs, the statement, or any amendment thereof, shall be added to the mandate upon request by the clerk of the court of appeals to the clerk of the district court.

. . . . .

Rule 40. Petition for rehearing.

(a) *Time for filing; content; answer; action by court if granted.*—A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule. The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requested by the court,

but a petition for rehearing will ordinarily not be granted in the absence of such a request. If a petition for rehearing is granted the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case.

(*b*) *Form of petition; length.*—The petition shall be in a form prescribed by Rule 32 (a), and copies shall be served and filed as prescribed by Rule 31 (b) for the service and filing of briefs. Except by permission of the court, or as specified by local rule of the court of appeals, a petition for rehearing shall not exceed 15 pages.

AMENDMENTS TO FEDERAL RULES OF CRIMINAL PROCEDURE

The following amendments to the Federal Rules of Criminal Procedure were prescribed by the Supreme Court of the United States on April 30, 1979, pursuant to 18 U. S. C. §§ 3771 and 3772, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *ante*, p. 970. The Judicial Conference Reports referred to in that letter are not reproduced herein.

Note that under 18 U. S. C. § 3771, such amendments do not take effect until so reported to Congress and until the expiration of 90 days thereafter. Moreover, Congress may defer the effective date to a later date or until approved by Act of Congress, or may modify such amendments.

For earlier publication of the Federal Rules of Criminal Procedure and the amendments thereto, see 327 U. S. 821, 335 U. S. 917, 949, 346 U. S. 941, 350 U. S. 1017, 383 U. S. 1087, 389 U. S. 1125, 401 U. S. 1025, 406 U. S. 979, 415 U. S. 1056, 416 U. S. 1001, 419 U. S. 1136, and 425 U. S. 1157.

SUPREME COURT OF THE UNITED STATES

MONDAY, APRIL 30, 1979

ORDERED:

1. That the Rules of Criminal Procedure for the United States District Courts be, and they hereby are, amended by including therein Rules 26.2 and 32.1 and amendments to Rules 6 (e), 7 (c)(2), 9 (a), 11 (e)(2) and (6), 17 (h), 18, 32 (c)(3)(E) and 32 (f), 35, 40, 41 (a), (b) and (c), and 44 (c) as hereinafter set forth:

[See *infra*, pp. 989–999.]

2. That the foregoing amendments and additions to the rules of procedure shall take effect on August 1, 1979, and shall govern all criminal proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing amendments and additions to the Rules of Criminal Procedure in accordance with the provisions of Title 18, United States Code, Sections 3771 and 3772.

AMENDMENTS TO FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 6. The grand jury.

. . . . .

(*e*) *Recording and disclosure of proceedings.*

(*1*) *Recording of proceedings.*—All proceedings, except when the grand jury is deliberating or voting, shall be recorded stenographically or by an electronic recording device. An unintentional failure of any recording to reproduce all or any portion of a proceeding shall not affect the validity of the prosecution. The recording or reporter's notes or any transcript prepared therefrom shall remain in the custody or control of the attorney for the government unless otherwise ordered by the court in a particular case.

(*2*) *General rule of secrecy.*—A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

(*3*) *Exceptions.*

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding; or

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

(*4*) *Sealed indictments.*—The federal magistrate to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons.

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Rule 7. The indictment and the information.

. . . . .

(*c*) *Nature and contents.*

. . . . .

(*2*) *Criminal forfeiture.*—No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or

the information shall allege the extent of the interest or property subject to forfeiture.

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Rule 9. Warrant or summons upon indictment or information.

(*a*) *Issuance.*—Upon the request of the attorney for the government the court shall issue a warrant for each defendant named in an information supported by a showing of probable cause under oath as is required by Rule 4 (a), or in an indictment. Upon the request of the attorney for the government a summons instead of a warrant shall issue. If no request is made, the court may issue either a warrant or a summons in its discretion. More than one warrant or summons may issue for the same defendant. The clerk shall deliver the warrant or summons to the marshal or other person authorized by law to execute or serve it. If a defendant fails to appear in response to the summons, a warrant shall issue.

. . . . .

Rule 11. Pleas.

. . . . .

(*e*) *Plea agreement procedure.*

. . . . .

(*2*) *Notice of such agreement.*—If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision (e)(1)(A) or (C), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw his plea.

. . . . .

(*6*) *Inadmissibility of pleas, plea discussions, and related statements.*—Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(A) a plea of guilty which was later withdrawn;

(B) a plea of nolo contendere;

(C) any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or

(D) any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

. . . . .

Rule 17. Subpoena.

. . . . .

(*h*) *Information not subject to subpoena.*—Statements made by witnesses or prospective witnesses may not be subpoenaed from the government or the defendant under this rule, but shall be subject to production only in accordance with the provisions of Rule 26.2.

Rule 18. Place of prosecution and trial.

Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses and the prompt administration of justice.

Rule 26.2. Production of statements of witnesses.

(*a*) *Motion for production.*—After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, shall order the attorney for the government or the defendant and his attorney, as the case may be, to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter concerning which the witness has testified.

(*b*) *Production of entire statement.*—If the entire contents of the statement relate to the subject matter concerning which the witness has testified, the court shall order that the statement be delivered to the moving party.

(*c*) *Production of excised statement.*—If the other party claims that the statement contains matter that does not relate to the subject matter concerning which the witness has testified, the court shall order that it be delivered to the court in camera. Upon inspection, the court shall excise the portions of the statement that do not relate to the subject matter concerning which the witness has testified, and shall order that the statement, with such material excised, be delivered to the moving party. Any portion of the statement that is withheld from the defendant over his objection shall be preserved by the attorney for the government, and, in the event of a conviction and an appeal by the defendant, shall be made available to the appellate court for the purpose of determining the correctness of the decision to excise the portion of the statement.

(*d*) *Recess for examination of statement.*—Upon delivery of the statement to the moving party, the court, upon application of that party, may recess proceedings in the trial for the examination of such statement and for preparation for its use in the trial.

(*e*) *Sanction for failure to produce statement.*—If the other party elects not to comply with an order to deliver a statement to the moving party, the court shall order that the

testimony of the witness be stricken from the record and that the trial proceed, or, if it is the attorney for the government who elects not to comply, shall declare a mistrial if required by the interest of justice.

(*f*) *Definition.*—As used in this rule, a "statement" of a witness means:

(1) a written statement made by the witness that is signed or otherwise adopted or approved by him;

(2) a substantially verbatim recital of an oral statement made by the witness that is recorded contemporaneously with the making of the oral statement and that is contained in a stenographic, mechanical, electrical, or other recording or a transcription thereof; or

(3) a statement, however taken or recorded, or a transcription thereof, made by the witness to a grand jury.

Rule 32. Sentence and judgment.

. . . . .

(*c*) *Presentence investigation.*

. . . . .

(*3*) *Disclosure.*

. . . . .

(E) The reports of studies and recommendations contained therein made by the Director of the Bureau of Prisons or the Parole Commission pursuant to 18 U. S. C. §§ 4205 (c), 4252, 5010 (e), or 5037 (c) shall be considered a presentence investigation within the meaning of subdivision (c)(3) of this rule.

. . . . .

(*f*) [*Revocation of probation.*] [*Abrogated*]

Rule 32.1. Revocation or modification of probation.

(*a*) *Revocation of probation.*

(*1*) *Preliminary hearing.*—Whenever a probationer is held in custody on the ground that he has violated a condition of his probation, he shall be afforded a prompt hearing before any judge, or a United States magistrate who has been given

authority pursuant to 28 U. S. C. § 636 to conduct such hearings, in order to determine whether there is probable cause to hold the probationer for a revocation hearing. The probationer shall be given

(A) notice of the preliminary hearing and its purpose and of the alleged violation of probation;

(B) an opportunity to appear at the hearing and present evidence in his own behalf;

(C) upon request, the opportunity to question witnesses against him unless, for good cause, the federal magistrate decides that justice does not require the appearance of the witness; and

(D) notice of his right to be represented by counsel.

The proceedings shall be recorded stenographically or by an electronic recording device. If probable cause is found to exist, the probationer shall be held for a revocation hearing. The probationer may be released pursuant to Rule 46 (c) pending the revocation hearing. If probable cause is not found to exist, the proceeding shall be dismissed.

(*2*) *Revocation hearing.*—The revocation hearing, unless waived by the probationer, shall be held within a reasonable time in the district of probation jurisdiction. The probationer shall be given

(A) written notice of the alleged violation of probation;

(B) disclosure of the evidence against him;

(C) an opportunity to appear and to present evidence in his own behalf;

(D) the opportunity to question witnesses against him; and

(E) notice of his right to be represented by counsel.

(*b*) *Modification of probation.*—A hearing and assistance of counsel are required before the terms or conditions of probation can be modified, unless the relief granted to the probationer upon his request or the court's own motion is favorable to him.

Rule 35. Correction or reduction of sentence.

(*a*) *Correction of sentence.*—The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence.

(*b*) *Reduction of sentence.*—The court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction. The court may also reduce a sentence upon revocation of probation as provided by law. Changing a sentence from a sentence of incarceration to a grant of probation shall constitute a permissible reduction of sentence under this subdivision.

Rule 40. Commitment to another district.

(*a*) *Appearance before federal magistrate.*—If a person is arrested in a district other than that in which the offense is alleged to have been committed, he shall be taken without unnecessary delay before the nearest available federal magistrate. Preliminary proceedings concerning the defendant shall be conducted in accordance with Rules 5 and 5.1, except that if no preliminary examination is held because an indictment has been returned or an information filed or because the defendant elects to have the preliminary examination conducted in the district in which the prosecution is pending, the person shall be held to answer upon a finding that he is the person named in the indictment, information or warrant. If the defendant is held to answer, he shall be held to answer in the district court in which the prosecution is pending, provided that a warrant is issued in that district if the arrest was made without a warrant, upon production of the warrant or a certified copy thereof.

(*b*) *Statement by federal magistrate.*—In addition to the statements required by Rule 5, the federal magistrate shall inform the defendant of the provisions of Rule 20.

(*c*) *Papers.*—If a defendant is held or discharged, the papers in the proceeding and any bail taken shall be transmitted to the clerk of the district court in which the prosecution is pending.

(*d*) *Arrest of probationer.*—If a person is arrested for a violation of his probation in a district other than the district of supervision, he shall be taken without unnecessary delay before the nearest available federal magistrate. The federal magistrate shall:

(1) Proceed in accordance with Rule 32.1 (a) if jurisdiction over the probationer is transferred to that district pursuant to 18 U. S. C. § 3653;

(2) Hold a prompt preliminary hearing in accordance with Rule 32.1 (a)(1) if the alleged violation occurred in that district, and either (i) hold the probationer to answer in the district court of the district having probation supervision or (ii) dismiss the proceedings and so notify that court; or

(3) Otherwise order the probationer held to answer in the district court of the district having probation jurisdiction upon production of certified copies of the probation order, the warrant, and the application for the warrant, and upon a finding that the person before him is the person named in the warrant.

(*e*) *Arrest for failure to appear.*—If a person is arrested on a warrant in a district other than that in which the warrant was issued, and the warrant was issued because of the failure of the person named therein to appear as required pursuant to a subpoena or the terms of his release, the person arrested shall be taken without unnecessary delay before the nearest available federal magistrate. Upon production of the warrant or a certified copy thereof and upon a finding that the person before him is the person named in the warrant, the federal magistrate shall hold the person to answer in the district in which the warrant was issued.

(*f*) *Bail.*—If bail was previously fixed in another district where a warrant, information or indictment issued, the fed-

eral magistrate shall take into account the amount of bail previously fixed and the reasons set forth therefor, if any, but will not be bound by the amount of bail previously fixed. If the federal magistrate fixes bail different from that previously fixed, he shall set forth the reasons for his action in writing.

Rule 41. Search and seizure.

(*a*) *Authority to issue warrant.*—A search warrant authorized by this rule may be issued by a federal magistrate or a judge of a state court of record within the district wherein the property or person sought is located, upon request of a federal law enforcement officer or an attorney for the government.

(*b*) *Property or persons which may be seized with a warrant.*—A warrant may be issued under this rule to search for and seize any (1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means of committing a criminal offense; or (4) person for whose arrest there is probable cause, or who is unlawfully restrained.

(*c*) *Issuance and contents.*

(*1*) *Warrant upon affidavit.*—A warrant other than a warrant upon oral testimony under paragraph (2) of this subdivision shall issue only on an affidavit or affidavits sworn to before the federal magistrate or state judge and establishing the grounds for issuing the warrant. If the federal magistrate or state judge is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property or person to be seized and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the federal magistrate or state judge may require the affiant to appear personally and

may examine under oath the affiant and any witnesses he may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall command the officer to search, within a specified period of time not to exceed 10 days, the person or place named for the property or person specified. The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. It shall designate a federal magistrate to whom it shall be returned.

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Rule 44. Right to and assignment of counsel.

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(*c*) *Joint representation.*—Whenever two or more defendants have been jointly charged pursuant to Rule 8 (b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

AMENDMENTS TO RULES GOVERNING 28 U. S. C. §§ 2254 AND 2255 PROCEEDINGS

The following amendments to the Rules Governing Proceedings in the United States District Courts under 28 U. S. C. §§ 2254 and 2255 were prescribed by the Supreme Court of the United States on April 30, 1979, pursuant to 28 U. S. C. § 2072 and 18 U. S. C. §§ 3771 and 3772, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *ante*, p. 970. The Judicial Conference Reports referred to in that letter are not reproduced herein.

Note that under 28 U. S. C. § 2072 and 18 U. S. C. § 3771, such amendments do not take effect until so reported to Congress and until the expiration of 90 days thereafter. Moreover, Congress may defer the effective date to a later date or until approved by Act of Congress, or may modify such amendments.

For earlier publication of the Rules Governing 28 U. S. C. §§ 2254 and 2255 Proceedings, see 425 U. S. 1167.

SUPREME COURT OF THE UNITED STATES

AMENDMENTS TO RULES GOVERNING PROCEEDINGS IN THE UNITED STATES DISTRICT COURTS UNDER SECTION 2254 AND SECTION 2255 OF TITLE 28, UNITED STATES CODE

MONDAY, APRIL 30, 1979

ORDERED:

1. That Rule 10 of the Rules Governing Proceedings in the United States District Courts on application under Section 2254 of Title 28, United States Code, be, and hereby is, amended to read as follows:

Rule 10. Powers of magistrates.

The duties imposed upon the judge of the district court by these rules may be performed by a United States magistrate pursuant to 28 U. S. C. § 636.

2. That Rules 10 and 11 of the Rules Governing Proceedings in the United States District Courts on a motion under Section 2255 of Title 28, United States Code, be, and they hereby are, amended to read as follows:

Rule 10. Powers of magistrates.

The duties imposed upon the judge of the district court by these rules may be performed by a United States magistrate pursuant to 28 U. S. C. § 636.

Rule 11. Time for appeal.

The time for appeal from an order entered on a motion for relief made pursuant to these rules is as provided in Rule 4 (a) of the Federal Rules of Appellate Procedure. Nothing in these rules shall be construed as extending the time to appeal from the original judgment of conviction in the district court.

3. That the foregoing amendments to the Rules Governing Proceedings in the United States District Courts under Section 2254 and Section 2255 of Title 28, United States Code, shall take effect on August 1, 1979, and shall be applicable to all proceedings then pending except to the extent that in the opinion of the court their application in a particular proceeding would not be feasible or would work injustice.

4. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit the aforementioned amendments to the Rules Governing Section 2254 and Section 2255 Proceedings to the Congress in accordance with the provisions of Section 2072 of Title 28, United States Code, and Sections 3771 and 3772 of Title 18, United States Code.

AMENDMENT TO FEDERAL RULES OF EVIDENCE

The following amendment to the Federal Rules of Evidence was prescribed by the Supreme Court of the United States on April 30, 1979, pursuant to 28 U. S. C. § 2076, and was reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *ante*, p. 970. The Judicial Conference Reports referred to in that letter are not reproduced herein.

Note that under 28 U. S. C. § 2076, such an amendment does not take effect until so reported to Congress and until the expiration of 180 days thereafter, and if Congress disapproves an amendment so reported it does not take effect. Moreover, Congress may defer the effective date to a later date or until approved by Act of Congress, or may modify such an amendment.

For earlier reference to the Federal Rules of Evidence, see 409 U. S. 1132.

SUPREME COURT OF THE UNITED STATES

AMENDMENT TO FEDERAL RULES OF EVIDENCE

MONDAY, APRIL 30, 1979

ORDERED:

1. That Rule 410 of the Federal Rules of Evidence be, and it hereby is, amended to read as follows:

Rule 410. Inadmissibility of pleas, plea discussions, and related statements.

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(1) a plea of guilty which was later withdrawn;

(2) a plea of nolo contendere;

(3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas; or

(4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

2. That the foregoing amendment to the Federal Rules of Evidence shall take effect on November 1, 1979, and shall be

applicable to all proceedings then pending except to the extent that in the opinion of the court the application of the amended rule in a particular proceeding would not be feasible or would work injustice.

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing amendment to the Federal Rules of Evidence in accordance with the provisions of 28 U. S. C. § 2076.

INDEX

ACTIONS. See **Age Discrimination in Employment Act of 1967; Constitutional Law,** IV, 3; **Education Amendments of 1972.**

ACTUAL MALICE. See **Constitutional Law,** VI, 1.

ADMINISTRATIVE PROCEDURE ACT. See **Judicial Review.**

ADMINISTRATIVE REMEDIES. See **Age Discrimination in Employment Act of 1967.**

ADOPTION. See **Constitutional Law,** IV, 1.

AD VALOREM PROPERTY TAXES. See **Constitutional Law,** I, 1; **Jurisdiction,** 2.

AFFIRMATIVE-ACTION REPORTS OF GOVERNMENT CONTRACTORS. See **Judicial Review.**

AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967.

Federal suit—Exhaustion of state administrative remedy—Time limitations.—Although under § 14 (b) of Act resort to administrative remedies by claimants in States with agencies empowered to remedy age discrimination in employment is mandatory, and although suit may not be brought under Act unless claimant has first commenced a proceeding with appropriate state agency, nevertheless claimant is not required by § 14 (b) to commence state proceedings within time limits specified by state law, and even though State's statute of limitations has run, claimant may yet comply with requirements of § 14 (b) by simply filing a signed complaint with state agency—it being appropriate that claimant's federal suit, charging that he had been forced by his employer to retire because of his age in violation of Act, be held in abeyance, rather than dismissed with leave to refile, while he pursues his state remedy. Oscar Mayer & Co. v. Evans, p. 750.

ALIENS. See **Constitutional Law,** IV, 2; **Procedure,** 1.

ANIMALS. See **Constitutional Law,** I, 2.

ANTIFRAUD PROVISIONS OF SECURITIES ACT OF 1933. See **Securities Act of 1933.**

ANTITRUST ACTS. See also **Procedure,** 2.

Price fixing—Blanket licenses to perform copyrighted musical compositions.—Issuance by American Society of Composers, Authors and Pub-

297-177 O - 81 - 61 : QL 3

ANTITRUST ACTS—Continued.
lishers and by Broadcast Music, Inc., of blanket licenses to perform copyrighted musical compositions at fees negotiated by them does not constitute price fixing *per se* unlawful under antitrust laws. Broadcast Music, Inc. v. CBS, p. 1.

APPEALS. See **Jurisdiction**, 2; **Procedure**, 1.

APPORTIONMENT OF STATE LEGISLATURES. See **Mandamus.**

ARKANSAS. See **Constitutional Law**, V.

ASSISTANCE OF COUNSEL. See **Constitutional Law**, VII; **Procedure**, 3.

ATTORNEY'S FAILURE TO PETITION FOR CERTIORARI. See **Procedure**, 3.

AUTHORIZATION FOR ELECTRONIC SURVEILLANCE. See **Constitional Law**, IX, 1; **Omnibus Crime Control and Safe Streets Act of 1968.**

BASTARDS. See **Constitutional Law**, IV, 1, 3.

BLANKET LICENSES TO PERFORM COPYRIGHTED MUSICAL COMPOSITIONS. See **Antitrust Acts.**

BODY-CAVITY SEARCHES OF PRETRIAL DETAINEES. See **Constitutional Law**, II, 2; IX, 2.

BROADCASTING. See **Antitrust Acts.**

BROKERS. See **Securities Act of 1933.**

BUGGING ACTIVITIES. See **Constitutional Law**, IX, 1; **Omnibus Crime Control and Safe Streets Act of 1968.**

CAFETERIA PRICES AND SERVICES AS SUBJECT TO COLLECTIVE BARGAINING. See **National Labor Relations Act.**

CALIFORNIA. See **Constitutional Law**, I, 1; **Jurisdiction**, 2.

CARGO CONTAINERS. See **Constitutional Law**, I, 1; **Jurisdiction**, 2.

CAUSES OF ACTION. See **Education Amendments of 1972; Judicial Review.**

CERTIFICATION. See **Procedure**, 1.

CERTIORARI. See **Procedure**, 3.

CITIZENSHIP QUALIFICATION FOR PUBLIC EMPLOYMENT. See **Constitutional Law**, IV, 2.

CIVIL COMMITMENT FOR MENTAL ILLNESS. See **Constitutional Law**, II, 1.

CIVIL RIGHTS. See **Age Discrimination in Employment Act of 1967; Education Amendments of 1972; Jurisdiction,** 1.

CIVIL RIGHTS ACT OF 1964. See **Age Discrimination in Employment Act of 1967; Education Amendments of 1972.**

CLASSIFICATIONS BASED ON ALIENAGE. See **Constitutional Law,** IV, 2.

COLLATERAL ATTACKS. See **Federal Rules of Criminal Procedure,** 2.

COLLECTIVE BARGAINING. See **National Labor Relations Act.**

COLLEGES. See **Education Amendments of 1972; Procedure,** 1.

COMMERCE CLAUSE. See **Constitutional Law,** I; X; **Jurisdiction,** 2.

COMMERCIAL RELATIONS WITH FOREIGN GOVERNMENTS. See **Constitutional Law,** I, 1; **Jurisdiction,** 2.

CONDEMNATION. See **Constitutional Law,** III.

CONDITIONS OF CONFINEMENT OF PRETRIAL DETAINEES. See **Constitutional Law,** II, 2; VI, 2; IX, 2.

CONFIDENTIAL BUSINESS INFORMATION. See **Judicial Review.**

CONSENT TO ADOPTION OF ILLEGITIMATE CHILD. See **Constitutional Law,** IV, 1.

CONSPIRACY TO TRANSPORT, RECEIVE, AND POSSESS STOLEN GOODS. See **Constitutional Law,** IX, 1.

CONSTITUTIONAL LAW. See also **Jurisdiction.**

I. Commerce Clause.

1. *Instrumentalities of foreign commerce—Validity of state tax.*—California ad valorem property tax, as applied to shipping containers owned by Japanese shipping companies and used exclusively in foreign commerce, is unconstitutional under Commerce Clause. Japan Line, Ltd. v. County of Los Angeles, p. 434.

2. *Shipping of minnows—Validity of state statute.*—Oklahoma statute prohibiting shipment of natural minnows taken from waters within State for sale outside State discriminates against interstate commerce and is repugnant to Commerce Clause. Hughes v. Oklahoma, p. 322.

II. Due Process.

1. *Involuntary commitment to mental hospital—Standard of proof.*—A "clear and convincing" standard of proof is required by Fourteenth Amendment in a state civil proceeding to commit an individual involuntarily to a mental hospital for an indefinite period, since even though due

CONSTITUTIONAL LAW—Continued.

process does not require States to use "beyond a reasonable doubt" standard applicable in criminal prosecutions, nevertheless greater standard than "preponderance of the evidence" standard applicable in other civil cases must be used. Addington v. Texas, p. 418.

2. *Pretrial detainees—Conditions of confinement.*—Due Process Clause of Fifth Amendment is not violated by practices of federal facility for confinement of pretrial detainees whereby (1) two inmates are assigned, primarily for sleeping purposes, in individual rooms originally intended for single occupancy, (2) inmates may not receive hard-cover books that are not mailed directly from publishers, book clubs, or bookstores, (3) inmates may not receive packages of food and personal items from outside institution, (4) inmates are subjected to body-cavity searches following contact visits with persons from outside institution, and (5) inmates are required to remain outside their rooms during routine room searches—none of such practices constituting "punishment" in violation of detainees' due process rights. Bell v. Wolfish, p. 520.

3. *Right to fair trial—Failure to give presumption-of-innocence instruction.*—Due Process Clause of Fourteenth Amendment does not absolutely require that an instruction on the presumption of innocence be given in every state criminal case, it being necessary to evaluate failure to give such instruction in light of totality of circumstances to determine whether defendant received a constitutionally fair trial. Kentucky v. Whorton, p. 786.

III. Eminent Domain.

Valuation of nonprofit organization's property—Fair market value.—In Government's condemnation proceedings to acquire land on which respondent, a private nonprofit organization, operated summer camps, allowing respondent fair market value of its property, rather than cost of substitute facilities, is consistent with principles of fairness underlying Just Compensation Clause of Fifth Amendment. United States v. 564.54 Acres of Land, p. 506.

IV. Equal Protection of the Laws.

1. *Adoption of illegitimate child—Parental consent—Validity of state statute.*—Sex-based distinction in New York statute permitting an unwed mother, but not an unwed father, to block adoption of their child simply by withholding her consent violates Equal Protection Clause because it bears no substantial relation to any important state interest. Caban v. Mohammed, p. 380.

2. *Public school teachers—Exclusion of aliens.*—New York statute forbidding permanent certification as a public school teacher of any person who is not a United States citizen unless that person has manifested an

CONSTITUTIONAL LAW—Continued.

intention to apply for citizenship does not violate Equal Protection Clause of Fourteenth Amendment. Ambach v. Norwick, p. 68.

3. *Wrongful death of illegitimate child—Suit by father—Validity of state statute.*—Judgment of Georgia Supreme Court holding that Equal Protection Clause was not violated by Georgia statute that precludes father of illegitimate child from suing for wrongful death of child but permits mother of an illegitimate child, or father if he has legitimated child and there is no mother, to sue for child's death, is affirmed. Parham v. Hughes, p. 347.

V. Freedom of Association.

Employee grievance procedure.—State Highway Commission's refusal to consider employee grievance when filed by union rather than directly by employee of State Highway Department does not violate First Amendment. Smith v. Arkansas State Highway Employees, p. 463.

VI. Freedom of Speech and Press.

1. *Defamation action—Actual malice—Press' privilege.*—When a member of press is alleged to have circulated damaging falsehoods and is sued for injury to plaintiff's reputation, there is no privilege under First Amendment's guarantees of freedom of speech and press barring plaintiff from inquiring into editorial processes of those responsible for publication where inquiry will produce evidence material to proof of a critical element of plaintiff's cause of action, such as whether defendant acted with actual malice. Herbert v. Lando, p. 153.

2. *Pretrial detainees—Restriction on receipt of books.*—Practice of federal facility for confinement of pretrial detainees whereby inmates may not receive hard-cover books that are not mailed directly from publishers, book clubs, or bookstores does not violate inmates' First Amendment rights but is rational response to security problem of preventing smuggling of contraband in books sent from outside. Bell v. Wolfish, p. 520.

VII. Right to Counsel.

Waiver during police interrogation.—An explicit statement of waiver is not invariably necessary to support a finding that a defendant, during interrogation by arresting officers, waived his right to counsel guaranteed by *Miranda* v. *Arizona*, 384 U. S. 436, waiver question being determinable on particular facts and circumstances of case. North Carolina v. Butler, p. 369.

VIII. Right to Jury Trial.

Six-person jury—Nonunanimous verdict.—Conviction by a nonunanimous six-person jury in a state criminal trial for a nonpetty offense, as contemplated by provisions of Louisiana Constitution and Code of Criminal Procedure that permit conviction by five out of six jurors, violates

CONSTITUTIONAL LAW—Continued.

accused's right to trial by jury guaranteed by Sixth and Fourteenth Amendments. Burch v. Louisiana, p. 130.

IX. Searches and Seizures.

1. *Electronic surveillance—Covert entry to install equipment.*—Fourth Amendment does not prohibit *per se* a covert entry to install otherwise legal electronic bugging equipment and does not require that an electronic surveillance order under Title III of Omnibus Crime Control and Safe Streets Act of 1968 include a specific authorization to enter covertly premises described in order. Dalia v. United States, p. 238.

2. *Pretrial detainees—Body-cavity searches—Room searches.*—Fourth Amendment is not violated by practices of federal facility for confinement of pretrial detainees whereby inmates are subjected to body-cavity searches following contact visits with persons from outside institution and whereby inmates are required to remain outside their rooms during routine room searches. Bell v. Wolfish, p. 520.

X. Supremacy Clause.

Generation of electricity—Validity of state tax.—New Mexico energy tax on generation of electricity within State, which by operation of tax-credit provision discriminates against electricity sold outside State, is invalid under Supremacy Clause because of prohibition against such discrimination contained in 15 U. S. C. § 391, which does not exceed permissible bounds of congressional action under Commerce Clause. Arizona Public Service Co. v. Snead, p. 141.

CONTINUANCES. See **Age Discrimination in Employment Act of 1967.**

CONTRABAND. See **Constitutional Law**, VI, 2; IX, 2.

COPYRIGHTED MUSICAL COMPOSITIONS. See **Antitrust Acts.**

CORPORATE DIRECTORS. See **Federal-State Relations.**

CORPORATE STOCK. See **Securities Act of 1933.**

CORPORATIONS. See **Federal-State Relations.**

COVERT ENTRY TO INSTALL SURVEILLANCE EQUIPMENT. See **Constitutional Law**, IX, 1; **Omnibus Crime Control and Safe Streets Act of 1968.**

CRIMINAL JUSTICE ACT OF 1964. See **Procedure**, 3.

CRIMINAL LAW. See **Constitutional Law**, II, 3; VII; VIII; IX, 1; **Federal Rules of Criminal Procedure**, 2; **Omnibus Crime Control and Safe Streets Act of 1968**; **Procedure**, 2, 3; **Securities Act of 1933.**

CUSTODIAL CONFINEMENT OF PRETRIAL DETAINEES. See Constitutional Law, II, 2; VI, 2; IX, 2.

CUSTODIAL POLICE INTERROGATIONS. See Constitutional Law, VII.

DEATH ACTIONS. See Constitutional Law, IV, 3.

DEFAMATION. See Constitutional Law, VI, 1.

DEFENDANT'S STATE OF MIND IN DEFAMATION ACTION. See Constitutional Law, VI, 1.

DEFENSE DEPARTMENT. See Judicial Review.

DEFENSE LOGISTICS AGENCY See Judicial Review.

DEMOLITION OF HOUSING PROJECT. See Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.

DEPARTMENT OF DEFENSE. See Judicial Review.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT. See Fair Housing Act of 1968; Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.

DEPARTMENT OF LABOR. See Judicial Review.

DERIVATIVE SUITS. See Federal-State Relations.

DIRECTORS' AUTHORITY TO DISCONTINUE SHAREHOLDERS' DERIVATIVE ACTIONS. See Federal-State Relations.

DISCLOSURE OF CONTRACTORS' REPORTS FURNISHED TO GOVERNMENT. See Judicial Review.

DISCLOSURE OF GRAND JURY TRANSCRIPTS. See Procedure, 2.

DISCONTINUANCE OF SHAREHOLDERS' SUIT AGAINST INVESTMENT COMPANY DIRECTORS AND ADVISER. See Federal-State Relations.

DISCOVERY. See Constitutional Law, VI, 1.

DISCRIMINATION AGAINST INTERSTATE COMMERCE. See Constitutional Law, I, 2.

DISCRIMINATION AGAINST OUT-OF-STATE SALES OF ELECTRICITY. See Constitutional Law, X.

DISCRIMINATION IN EDUCATION PROGRAMS. See Education Amendments of 1972.

DISCRIMINATION IN EMPLOYMENT. See Age Discrimination in Employment Act of 1967.

DISCRIMINATION IN SALES OR RENTAL OF HOUSING. See **Fair Housing Act of 1968.**

DISLOCATION OF HOUSING PROJECT TENANTS. See **Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.**

DISMISSAL OF ACTIONS. See **Age Discrimination in Employment Act of 1967.**

DISTRICT COURTS. See **Age Discrimination in Employment Act of 1967; Jurisdiction,** 1; **Mandamus; Procedure,** 2.

DOMICILE. See **Procedure,** 1.

"DOUBLE-BUNKING" OF PRETRIAL DETAINEES. See **Constitutional Law,** II, 2.

DRUG OFFENSES. See **Federal Rules of Criminal Procedure,** 2.

DUE PROCESS. See **Constitutional Law,** II.

EDITORIAL PRIVILEGE IN DEFAMATION ACTION. See **Constitutional Law,** VI, 1.

EDUCATION AMENDMENTS OF 1972.

Federally funded programs—Sex discrimination—Private remedy.—Notwithstanding absence of express authorization of private right of action in Title IX of Amendments, petitioner has implied private remedy and may maintain action in Federal District Court alleging that she had been excluded from participation in medical education programs of respondent private universities on basis of her gender and that programs were receiving federal financial assistance at time of her exclusion. Cannon v. University of Chicago, p. 677.

ELECTIONS. See **Mandamus.**

ELECTRICITY. See **Constitutional Law,** X.

ELECTRONIC SURVEILLANCE. See **Constitutional Law,** IX, 1; **Omnibus Crime Control and Safe Streets Act of 1968.**

EMINENT DOMAIN. See **Constitutional Law,** III.

EMPLOYER AND EMPLOYEES. See **Age Discrimination in Employment Act of 1967; Constitutional Law,** V; **National Labor Relations Act.**

ENERGY TAXES. See **Constitutional Law,** X.

EQUAL PROTECTION OF THE LAWS. See **Constitutional Law,** IV.

EVIDENCE. See **Constitutional Law,** II, 1; VI, 1.

EXCLUSION FROM PARTICIPATION IN EDUCATION PROGRAM. See **Education Amendments of 1972.**

EXCLUSION OF ALIENS FROM PUBLIC EMPLOYMENT. See **Constitutional Law,** IV, 2.

EXEMPTIONS FROM DISCLOSURE UNDER FREEDOM OF INFORMATION ACT. See **Judicial Review.**

EXHAUSTION OF ADMINISTRATIVE REMEDIES. See **Age Discrimination in Employment Act of 1967.**

FACILITIES FOR CONFINEMENT OF PRETRIAL DETAINEES. See **Constitutional Law,** II, 2; VI, 2; IX, 2.

FAIR HOUSING ACT OF 1968.

1. *Real estate brokers—Racial discrimination in sales of housing—Standing to sue.*—In litigation under § 812 of Act against petitioners, two real estate brokerage firms and certain of their employees, based on their allegedly steering prospective Negro homeowners toward an integrated ("target") area in respondent village while steering white customers away from such area, village has standing under Art. III to challenge legality of petitioners' conduct if, as alleged, their sales practices actually have begun to rob village of its racial balance and stability; and individual respondents who live in target area, but not those who live outside area, also have standing under Art. III in view of allegations that target area is losing its integrated character because of petitioners' conduct, and that their conduct has caused economic injury to respondents. Gladstone, Realtors v. Village of Bellwood, p. 91.

2. *Remedies—Standing to sue.*—Sections 810 and 812 of Act, which relate to enforcement of rights under Act against racial discrimination in sales or rental of housing, provide alternative remedies to precisely same class of plaintiffs, with result that standing under both sections is as broad as is permitted by Art. III. Gladstone, Realtors v. Village of Bellwood, p. 91.

FAIR MARKET VALUE OF CONDEMNED PROPERTY. See **Constitutional Law,** III.

FAIR TRIAL. See **Constitutional Law,** II, 3.

FATHERS OF ILLEGITIMATE CHILDREN. See **Constitutional Law,** IV, 1, 3.

FEDERAL FUNDING OF EDUCATION PROGRAMS. See **Education Amendments of 1972.**

FEDERAL HOUSING PROJECTS. See **Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.**

FEDERAL RULES OF APPELLATE PROCEDURE.

Amendments to Rules, p. 969.

FEDERAL RULES OF CRIMINAL PROCEDURE. See also **Procedure**, 2.

1. Amendments to Rules, p. 985.

2. *Guilty plea—Violation of Rule 11—Postconviction proceeding.*—A conviction based on a guilty plea is not subject to collateral attack in proceedings under 28 U. S. C. § 2255 merely because of a formal violation of Rule 11 by trial judge who, in accepting a guilty plea to a federal drug offense, had explained that defendant could receive a 15-year prison sentence and a $25,000 fine but had failed to mention a mandatory special parole term of at least 3 years required by applicable statute, defendant having been sentenced to 10 years' imprisonment plus a 5-year special parole term, and fined $5,000. United States v. Timmreck, p. 780.

FEDERAL RULES OF EVIDENCE.

Amendment to Rules, p. 1005.

FEDERAL-STATE RELATIONS. See also **Age Discrimination in Employment Act of 1967; Constitutional Law**, I; X; **Education Amendments of 1972; Jurisdiction.**

Shareholders' derivative action—Violations of federal laws—Directors' authority to discontinue suit—State law.—In suits alleging violations of Investment Company Act of 1940 and Investment Advisers Act of 1940, federal courts should, as a matter of federal law, apply state law in determining authority of independent directors of investment company to discontinue derivative suits against other directors and company's investment adviser to extent such law is consistent with policies of federal Acts, Congress not requiring that States, or federal courts, absolutely forbid director termination of all nonfrivolous actions. Burks v. Lasker, p. 471.

FIFTH AMENDMENT. See **Constitutional Law**, II, 2; III.

FIRST AMENDMENT. See **Constitutional Law**, V; VI.

FISH AND GAME LAWS. See **Constitutional Law**, I, 2.

FOOD AND BEVERAGE PRICES AND SERVICES AS SUBJECT TO COLLECTIVE BARGAINING. See **National Labor Relations Act.**

FOOD PACKAGES FOR PRETRIAL DETAINEES. See **Constitutional Law**, II, 2.

FORCED RETIREMENT BECAUSE OF AGE. See **Age Discrimination in Employment Act of 1967.**

FOREIGN COMMERCE. See **Constitutional Law**, I, 1; **Jurisdiction**, 2.

FOURTEENTH AMENDMENT. See **Constitutional Law**, II, 1, 3; IV; VI, 1; VIII.

FOURTH AMENDMENT. See **Constitutional Law**, IX.

FRAUD IN SALE OF SECURITIES. See **Securities Act of 1933.**

FREEDOM OF ASSOCIATION. See **Constitutional Law**, V.

FREEDOM OF INFORMATION ACT. See **Judicial Review.**

FREEDOM OF SPEECH. See **Constitutional Law**, V; VI.

FREEDOM OF THE PRESS. See **Constitutional Law**, VI, 1.

GENERATION OF ELECTRICITY. See **Constitutional Law**, X.

GEORGIA. See **Constitutional Law**, IV, 3.

GOVERNMENT CONTRACTORS. See **Judicial Review.**

GOVERNMENT'S DISCLOSURE OF INFORMATION RECEIVED FROM CONTRACTOR. See **Judicial Review.**

GRAND JURY TRANSCRIPTS. See **Procedure**, 2.

GRIEVANCES OF EMPLOYEES. See **Constitutional Law**, V.

GUILTY PLEAS. See **Federal Rules of Criminal Procedure**, 2.

HABEAS CORPUS.

Amendment to Rules Governing 28 U. S. C. § 2254 Proceedings, p. 1001.

HARD-COVER BOOKS. See **Constitutional Law**, II, 2; VI, 2.

HOSPITALIZATION FOR MENTAL ILLNESS. See **Constitutional Law**, II, 1.

HOUSING AND URBAN DEVELOPMENT DEPARTMENT. See **Fair Housing Act of 1968; Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.**

HOUSING SALES OR RENTALS. See **Fair Housing Act of 1968.**

ILLEGITIMATE CHILDREN. See **Constitutional Law**, IV, 1, 3.

IMPLICIT WAIVER OF RIGHT TO COUNSEL. See **Constitutional Law**, VII.

IMPLIED PRIVATE RIGHTS OF ACTION. See **Education Amendments of 1972; Judicial Review.**

INCRIMINATING STATEMENTS. See **Constitutional Law**, VII.

INJUNCTIONS. See **Judicial Review.**

IN-PLANT FOOD AND BEVERAGE PRICES AND SERVICES AS SUBJECT TO COLLECTIVE BARGAINING. See **National Labor Relations Act.**

INSPECTION OF ROOMS OF PRETRIAL DETAINEES. See **Constitutional Law,** II, 2; IX, 2.

INSTALLING ELECTRONIC SURVEILLANCE EQUIPMENT. See **Constitutional Law,** IX, 1; **Omnibus Crime Control and Safe Streets Act of 1968.**

IN-STATE STATUS OF COLLEGE STUDENTS. See **Procedure,** 1.

INSTRUCTIONS TO JURY ON PRESUMPTION OF INNOCENCE. See **Constitutional Law,** II, 3.

INTEGRATED NEIGHBORHOODS. See **Fair Housing Act of 1968.**

INTERCEPTED COMMUNICATIONS. See **Constitutional Law,** IX, 1; **Omnibus Crime Control and Safe Streets Act of 1968.**

INTERSTATE COMMERCE. See **Constitutional Law,** I, 2; X.

INVESTMENT ADVISERS ACT OF 1940. See **Federal-State Relations.**

INVESTMENT COMPANY ACT OF 1940. See **Federal-State Relations.**

INVESTORS. See **Securities Act of 1933.**

INVOLUNTARY RETIREMENT BECAUSE OF AGE. See **Age Discrimination in Employment Act of 1967.**

IOWA. See **Age Discrimination in Employment Act of 1967.**

JUDICIAL REVIEW.

Government's disclosure of contractor's reports—Right to review.—Although Government contractor has no private right of action under Freedom of Information Act or Trade Secrets Act to enjoin Government's disclosure to third parties of certain reports of contractor that related to its affirmative-action program and general composition of its work force and that were furnished pursuant to Department of Labor regulations which provide for disclosure notwithstanding exemption from mandatory disclosure under FOIA, nevertheless, type of disclosure threatened here was not "authorized by law" within meaning of Trade Secrets Act, and contractor has right under Administrative Procedure Act to judicial review of agency's disclosure decision. Chrysler Corp. v. Brown, p. 281.

JURISDICTION.

1. *Federal district courts—Conflict between state welfare regulation and Social Security Act.*—Federal district courts' jurisdiction under 28 U. S. C. §§ 1343 (3) and (4) does not encompass claims that a state welfare regulation is invalid because it conflicts with Social Security Act, neither that Act nor 42 U. S. C. § 1983 constituting a statute securing "equal rights" within § 1343 (3) or "civil rights" within § 1343 (4). Chapman v. Houston Welfare Rights Org., p. 600.

2. *Supreme Court—State-court judgment—Validity of state tax.*—This Court has appellate jurisdiction under 28 U. S. C. § 1257 (2) of an appeal from California Supreme Court's judgment upholding application of state ad valorem property tax to shipping containers owned by Japanese shipping companies and used exclusively in foreign commerce, since California court sustained application of tax as against contention that such application would violate Commerce Clause and various treaties. Japan Line, Ltd. v. County of Los Angeles, p. 434.

JURY INSTRUCTIONS ON PRESUMPTION OF INNOCENCE. See **Constitutional Law**, II, 3.

JURY TRIALS. See **Constitutional Law**, VIII.

JUST COMPENSATION CLAUSE. See **Constitutional Law, III.**

KENTUCKY. See **Constitutional Law**, II, 3.

KNOWING FALSEHOODS. See **Constitutional Law**, VI, 1.

LABOR DEPARTMENT. See **Judicial Review.**

LABOR UNIONS. See **Constitutional Law**, V; **National Labor Relations Act.**

LEGISLATIVE REAPPORTIONMENT PLANS. See **Mandamus.**

LIBEL. See **Constitutional Law**, VI, 1.

LIBERTY RIGHTS. See **Constitutional Law**, II, 2.

LICENSES. See **Antitrust Acts.**

LIMITATION OF ACTIONS. See **Age Discrimination in Employment Act of 1967.**

LOUISIANA. See **Constitutional Law**, VIII.

MAGAZINES. See **Constitutional Law**, VI, 1.

MAIL RESTRICTIONS AS TO PRETRIAL DETAINEES. See **Constitutional Law**, II, 2; VI, 2.

MALICE. See **Constitutional Law**, VI, 1.

MANDAMUS.

Reapportionment of Mississippi Legislature—District Court plan.—Petition for writ of mandamus to require Federal District Court to adopt reapportionment plan for Mississippi Legislature is denied, where District Court adopted plan after this Court granted leave to file mandamus petition, and parties announced that there would be no appeal. Connor v. Coleman, p. 792.

MANDATORY PAROLE SENTENCE. See **Federal Rules of Criminal Procedure**, 2.

MARYLAND. See **Procedure**, 1.

MEDICAL SCHOOLS. See **Education Amendments of 1972.**

MENTAL ILLNESS. See **Constitutional Law**, II, 1.

MINNOWS. See **Constitutional Law**, I, 2.

MIRANDA WARNINGS. See **Constitutional Law**, VII.

MISSISSIPPI. See **Mandamus.**

MUNICIPAL CORPORATIONS. See **Fair Housing Act of 1968.**

MUTUAL FUNDS. See **Federal-State Relations.**

NATIONAL LABOR RELATIONS ACT.

Collective bargaining—Cafeteria and vending machine prices and services.—In-plant cafeteria and vending machine food and beverage prices and services are "terms and conditions of employment" subject to mandatory collective bargaining under §§ 8 (a) (5) and 8 (d) of Act. Ford Motor Co. v. NLRB, p. 488.

NATIONAL LABOR RELATIONS BOARD. See **National Labor Relations Act.**

NEGROES. See **Fair Housing Act of 1968.**

NEW JERSEY. See **Jurisdiction**, 1.

NEW MEXICO. See **Constitutional Law**, X.

NEWS MEDIA. See **Constitutional Law**, VI, 1.

NEW YORK. See **Constitutional Law**, IV, 1, 2.

NEW YORK TIMES RULE. See **Constitutional Law**, VI, 1.

NONIMMIGRANT ALIENS. See **Procedure**, 1.

NONPETTY CRIMINAL OFFENSES. See **Constitutional Law**, VIII.

NONUNANIMOUS VERDICT IN CRIMINAL CASE. See **Constitutional Law**, VIII.

NORTH CAROLINA. See **Constitutional Law**, VII.

OBSCENITY PROSECUTION. See **Constitutional Law**, VIII.

OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS. See **Judicial Review.**

OIL COMPANIES. See **Procedure**, 2.

OKLAHOMA. See **Constitutional Law**, I, 2.

OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968. See also **Constitutional Law**, IX, 1.

Electronic surveillance—Authorization of covert entries.—Under Title III of Act, courts have authority to approve covert entries for purpose of installing electronic surveillance equipment. Dalia v. United States, p. 238.

PARENTAL CONSENT TO ADOPTION OF ILLEGITIMATE CHILD. See **Constitutional Law**, IV, 1.

PARENT'S RIGHT TO SUE FOR DEATH OF ILLEGITIMATE CHILD. See **Constitutional Law**, IV, 3.

PAROLE. See **Federal Rules of Criminal Procedure**, 2.

PERFORMANCE OF COPYRIGHTED MUSICAL COMPOSITIONS. See **Antitrust Acts.**

PER SE RESTRAINTS OF TRADE. See **Antitrust Acts.**

PLEAS. See **Federal Rules of Criminal Procedure**, 2.

POLICE INTERROGATIONS. See **Constitutional Law**, VII.

POSTCONVICTION PROCEEDINGS. See also **Federal Rules of Criminal Procedure**, 2.

Amendments to Rules Governing 28 U. S. C. § 2255 Proceedings, p. 1001.

PRE-EMPTION. See **Constitutional Law**, X.

PRESS' PRIVILEGE IN DEFAMATION ACTION. See **Constitutional Law**, VI, 1.

PRESUMPTION OF INNOCENCE. See **Constitutional Law**, II, 2, 3.

PRETRIAL DETAINEES. See **Constitutional Law**, II, 2; VI, 2; IX, 2.

PRETRIAL DISCOVERY. See **Constitutional Law**, VI, 1.

PRICE FIXING. See **Antitrust Acts**; **Procedure**, 2.

PRICES OF FOOD AND BEVERAGES AS SUBJECT TO COLLECTIVE BARGAINING. See **National Labor Relations Act.**

PRISONERS. See **Constitutional Law**, II, 2; VI, 2; IX, 2.

PRIVACY RIGHTS. See **Constitutional Law**, IX, 2.

PRIVATE CAUSES OF ACTION. See **Education Amendments of 1972; Judicial Review.**

PRIVATE UNIVERSITIES. See **Education Amendments of 1972.**

PRIVILEGE OF PRESS IN DEFAMATION ACTION. See **Constitutional Law**, VI, 1.

PROCEDURE. See also **Age Discrimination in Employment Act of 1967; Federal Rules of Criminal Procedure**, 2; **Mandamus.**

1. *G–4 aliens—Domicile for admission to university—Certification of question to state court—Remand.*—Where, after this Court certified to Maryland Court of Appeals question whether aliens holding G–4 visas (nonimmigrant visas granted to officers or employees of international organizations and members of their immediate families) are incapable as a matter of state law of becoming domiciliaries of Maryland, and before Maryland court answered certified question in the negative, University of Maryland's Board of Regents adopted a resolution reaffirming its policy of denying in-state status for tuition purposes to nonimmigrant aliens regardless of whether its policy conformed to definition of domicile under Maryland law, this Court will not restore case to active docket, but will remand case to Federal District Court for initial consideration of new constitutional issues raised by Board of Regent's resolution. Toll v. Moreno, p. 458.

2. *Grand jury transcripts—Disclosure in subsequent proceedings.*—Under Fed. Rule Crim. Proc. 6 (e), grand jury transcripts may be made available in subsequent proceedings when need for disclosure of discrete portions outweighs interest in grand jury secrecy, but Federal District Court in California having custody of transcripts of grand jury proceedings that resulted in indictment of several oil companies for illegal price fixing abused its discretion in ordering disclosure of transcripts to plaintiffs in civil antitrust actions in Federal District Court in Arizona against only some of indicted oil companies and involving only some of same territory as was involved in criminal case. Douglas Oil Co. v. Petrol Stops Northwest, p. 211.

3. *Review of federal convictions—Untimely petition for certiorari—Remand.*—Where *pro se* petitioner's untimely petition for certiorari to review Court of Appeals' affirmance of petitioner's federal convictions alleged that court-appointed counsel had failed to file a timely petition as requested by petitioner, this Court will, as suggested by Solicitor General and even though petitioner had not first sought relief in Court of Appeals, grant certiorari, vacate Court of Appeals' judgment, and remand case for re-entry of Court of Appeals' judgment and, if appropriate, ap-

PROCEDURE—Continued.

pointment of counsel to assist petitioner in seeking timely review of that judgment. Wilkins v. United States, p. 468.

PROPERTY RIGHTS. See **Constitutional Law**, II, 2.

PRO SE PETITIONERS. See **Procedure**, 3.

PUBLIC EMPLOYEES. See **Constitutional Law**, IV, 2; V.

PUBLIC FIGURES. See **Constitutional Law**, VI, 1.

PUBLIC HOUSING PROJECTS. See **Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.**

PUBLIC SCHOOL TEACHERS. See **Constitutional Law**, IV, 2.

PUNISHMENT OF PRETRIAL DETAINEES. See **Constitutional Law**, II, 2.

RACIAL DISCRIMINATION. See **Fair Housing Act of 1968.**

REAL ESTATE BROKERS' RACIAL "STEERING" OF CUSTOMERS. See **Fair Housing Act of 1968.**

REAPPORTIONMENT PLANS. See **Mandamus.**

RECEIVING STOLEN GOODS. See **Constitutional Law**, IX, 1.

RECKLESS DISREGARD OF TRUTH. See **Constitutional Law**, VI, 1.

REFUSAL TO BARGAIN. See **National Labor Relations Act.**

RELOCATION ASSISTANCE. See **Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.**

REMAND. See **Procedure**, 1, 3.

REMEDIES. See **Education Amendments of 1972; Fair Housing Act of 1968; Judicial Review.**

RENTAL OF HOUSING. See **Fair Housing Act of 1968.**

REPORTER'S PRIVILEGE IN DEFAMATION ACTION. See **Constitutional Law**, VI, 1.

RESTRAINTS OF TRADE. See **Antitrust Acts.**

RETIREMENT. See **Age Discrimination in Employment Act of 1967.**

RIGHTS OF ACTION. See **Education Amendments of 1972; Judicial Review.**

RIGHT TO COUNSEL. See **Constitutional Law**, VII; **Procedure**, 3.

RIGHT TO FAIR TRIAL. See **Constitutional Law**, II, 3.

297-177 O - 81 - 62 : QL 3

RIGHT TO TRIAL BY JURY. See **Constitutional Law**, VIII.

ROOM SEARCHES AT PRETRIAL DETENTION FACILITY. See **Constitutional Law**, II, 2; IX, 2.

RULE OF REASON. See **Antitrust Acts.**

RULES OF SUPREME COURT. See **Procedure**, 3.

SALES OF ELECTRICITY. See **Constitutional Law**, X.

SALES OF HOUSING. See **Fair Housing Act of 1968.**

SCHEME TO DEFRAUD IN SECURITIES TRANSACTION. See **Securities Act of 1933.**

SCHOOLTEACHERS. See **Constitutional Law**, IV, 2.

SEARCHES AND SEIZURES. See **Constitutional Law**, IX.

SECRECY OF GRAND JURY PROCEEDINGS. See **Procedure**, 2.

SECURITIES ACT OF 1933.

Antifraud provisions of § 17 (a) (1)—Protection of brokers.—Provisions of § 17 (a) (1) of Act making it unlawful to employ any scheme to defraud in offer or sale of any securities prohibits frauds against brokers as well as investors. United States v. Naftalin, p. 768.

SENTENCES. See **Federal Rules of Criminal Procedure**, 2.

SEX DISCRIMINATION. See **Constitutional Law**, IV, 1; **Education Amendments of 1972.**

SHAREHOLDERS' DERIVATIVE SUITS. See **Federal-State Relations.**

SHERMAN ACT. See **Antitrust Acts.**

SHIPPING CONTAINERS. See **Constitutional Law**, I, 1; **Jurisdiction**, 1.

"SHORT SELLING" IN SECURITIES TRANSACTION. See **Securities Act of 1933.**

SIX-PERSON JURIES. See **Constitutional Law**, VIII.

SIXTH AMENDMENT. See **Constitutional Law**, VIII.

SLANDER. See **Constitutional Law**, VI, 1.

SOCIAL SECURITY ACT. See **Jurisdiction**, 1.

STANDARD OF PROOF FOR CIVIL COMMITMENT FOR MENTAL ILLNESS. See **Constitutional Law**, II, 1.

STANDING TO SUE. See **Fair Housing Act of 1968.**

STATE OWNERSHIP OF WILD ANIMALS. See **Constitutional Law**, I, 2.

STATE TAXATION OF INSTRUMENTALITIES OF FOREIGN COMMERCE. See **Constitutional Law**, I, 1; **Jurisdiction**, 2.

STATUTE OF LIMITATIONS. See **Age Discrimination in Employment Act of 1967.**

STOCK BROKERS. See **Securities Act of 1933.**

SUBSTITUTE-FACILITIES COMPENSATION FOR CONDEMNED PROPERTY. See **Constitutional Law**, III.

SUPPRESSION OF EVIDENCE. See **Constitutional Law**, VII; IX, 1.

SUPREMACY CLAUSE. See **Constitutional Law**, X; **Jurisdiction**, 1.

SUPREME COURT. See also **Jurisdiction**, 2; **Mandamus**; **Procedure**, 1, 3.

1. Amendments to Federal Rules of Appellate Procedure, p. 969.
2. Amendments to Federal Rules of Criminal Procedure, p. 985.
3. Amendment to Federal Rules of Evidence, p. 1005.
4. Amendments to Rules Governing 28 U. S. C. §§ 2254 and 2255 Proceedings, p. 1001.

SUPREME COURT RULES. See **Procedure**, 3.

SURVEILLANCE. See **Constitutional Law**, IX, 1; **Omnibus Crime Control and Safe Streets Act of 1968.**

TAXES. See **Constitutional Law**, I, 1; X; **Jurisdiction**, 2.

TAX ON GENERATION OF ELECTRICITY. See **Constitutional Law**, X.

TELEVISION BROADCASTING. See **Antitrust Acts**; **Constitutional Law**, VI, 1.

TENANTS. See **Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.**

TEXAS. See **Constitutional Law**, II, 1; **Jurisdiction**, 1.

TIME LIMITATIONS ON ACTIONS. See **Age Discrimination in Employment Act of 1967.**

TRADE SECRETS ACT. See **Judicial Review.**

TRANSCRIPTS OF GRAND JURY PROCEEDINGS. See **Procedure**, 2.

TRIAL BY JURY. See **Constitutional Law**, VIII.

UNANIMOUS VERDICTS. See **Constitutional Law**, VIII.

UNFAIR LABOR PRACTICES. See **National Labor Relations Act.**

UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION POLICIES ACT OF 1970.

Federal projects—Displaced tenants—Right to assistance.—Under § 101 (6) of Act, only those persons ordered to vacate property in connection with actual or proposed acquisition of property for a federal program are entitled to relocation benefits, and thus tenants in housing projects that Department of Housing and Urban Development acquired because projects' sponsors defaulted on federally insured loans were not entitled to relocation assistance when they were dislocated upon HUD's subsequent decision to close housing project or demolish project and sell land to private developers. Alexander v. U. S. Dept. of HUD, p. 39.

UNIONS. See **Constitutional Law,** V; **National Labor Relations Act.**

UNIVERSITIES. See **Education Amendments of 1972; Procedure,** 1.

UNMARRIED PARENTS. See **Constitutional Law,** IV, 1, 3.

UNTIMELY PETITION FOR CERTIORARI. See **Procedure,** 3.

UTILITY COMPANIES. See **Constitutional Law,** X.

VALUATION OF PRIVATE NONPROFIT ORGANIZATION'S PROPERTY UPON CONDEMNATION. See **Constitutional Law,** III.

VENDING MACHINE PRICES AND SERVICES AS SUBJECT TO COLLECTIVE BARGAINING. See **National Labor Relations Act.**

VERDICTS. See **Constitutional Law,** VIII.

VILLAGES. See **Fair Housing Act of 1968.**

WAIVER OF RIGHT TO COUNSEL. See **Constitutional Law,** VII.

WARRANTS. See **Constitutional Law,** IX, 1.

WELFARE BENEFITS. See **Jurisdiction,** 1.

WILDLIFE. See **Constitutional Law,** I, 2.

WORDS AND PHRASES.

1. *"Adversely affected or aggrieved."* § 10 (a), Administrative Procedure Act, 5 U. S. C. § 702. Chrysler Corp. v. Brown, p. 281.

2. *"Authorized by law."* Trade Secrets Act, 18 U. S. C. § 1905. Chrysler Corp. v. Brown, p. 281.

3. *"Authorized by law."* 28 U. S. C. § 1343 (3). Chapman v. Houston Welfare Rights Org., p. 600.

4. *"Commenced."* § 14 (b), Age Discrimination in Employment Act of 1967, 29 U. S. C. § 633 (b). Oscar Mayer & Co. v. Evans, p. 750.

WORDS AND PHRASES—Continued.

5. *"Displaced person."* § 101 (6), Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U. S. C. § 4601 (6). Alexander v. U. S. Dept. of HUD, p. 39.

6. *"In the offer or sale of any securities."* § 17 (a)(1), Securities Act of 1933, 15 U. S. C. § 77q (a)(1). United States v. Naftalin, p. 768.

7. *"Providing for the protection of civil rights, including the right to vote."* 28 U. S. C. § 1343 (4). Chapman v. Houston Welfare Rights Org., p. 600.

8. *"Secured by the Constitution of the United States or by an Act of Congress providing for equal rights."* 28 U. S. C. § 1343 (3). Chapman v. Houston Welfare Rights Org., p. 600.

9. *"Terms and conditions of employment."* § 8 (d), National Labor Relations Act, 29 U. S. C. § 158 (d). Ford Motor Co. v. NLRB, p. 488.

WRONGFUL-DEATH ACTIONS. See **Constitutional Law, IV, 3.**

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